85949-3

No. _____

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 635182

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION I

RANDY ANFINSON, JAMES GEIGER and STEVEN HARDIE,
individually and on behalf of others similarly situated,

Respondents,

v.

FEDEX GROUND PACKAGE SYSTEM, INC.,
Petitioner.

FILED
APR 29 2011
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

The petitioner is FedEx Ground Package System, Inc., respondent in the Court of Appeals and defendant in the King County Superior Court.

B. COURT OF APPEALS DECISION AND ORDER

The Court of Appeals filed its published decision on December 20, 2010, (Appendix, A-1 through A-19), and denied FXG's motion for reconsideration by order dated February 23, 2011. (App., A-20).

C. ISSUES PRESENTED FOR REVIEW

Three issues merit Supreme Court review under RAP 13.4:

1. This Court has never defined the standards for determining independent contractor status under the Washington Minimum Wage Act ("MWA"), RCW 49.46.130, or the Washington Industrial Welfare Act ("IWA"), RCW 49.12.450. Did the Court of Appeals err in holding that the independent contractor status of class members for these claims must be determined by the six factors of the "economic realities" test under the Fair Labor Standards Act ("FLSA"), and that the trial court lacks discretion to include additional factors or refer to "right to control" in the jury instruction's preamble?

2. Did the Court of Appeals err in holding that judicial estoppel applies only to factually inconsistent positions and thus did not preclude plaintiffs from taking inconsistent legal positions by advocating

use of the "right of control" test to obtain class certification, but then on the eve of trial, contend that the "economic realities" test actually governs the trial of the MWA and IWA claims?

3. The trial court instructed the jury in this class action that it should not consider individualized evidence unless it finds that such evidence reflects policies, procedures or practices common to the class. Did the Court of Appeals err in holding that plaintiffs are not required to establish their class-wide claims by common evidence and that plaintiffs can use "representative evidence" to prove employment status?

D. STATEMENT OF THE CASE

This case raises novel issues regarding the correct legal tests for determining independent contractor status under the MWA for overtime wages and under IWA for uniform expense reimbursement, and the necessity of a common evidence jury instruction to govern the jury's resolution of claims tried on a class-wide basis. The 320 class members in this certified case are individuals, sole proprietors, limited liability companies and corporations who contracted with FXG between 2001 and 2005 to provide small package pick-up and delivery services from 15 terminals across Washington. The class members own or lease their delivery vehicles from third parties, have a proprietary interest in their routes (which they buy and sell in whole or part, often for substantial

profit), may own multiple routes, and often hire others to perform the contractually agreed to services. RP 3/5/09 p. 67, RP 3/12/09 p. 240, RP 3/17/09 p. 180. Plaintiffs claim that these class members are employees of FXG, not independent contractors.

To obtain class certification under CR 23(b)(3) and throughout the case, plaintiffs consistently argued that the common law right to control test applied to determine independent contractor status under both the MWA and IWA. CP 209-19; *see* CP 267-75 (motion for partial summary judgment); CP 2881-911 (motions in limine). Then, just before trial, plaintiffs reversed course and argued that the jury should decide employment status using the FLSA economic realities test. CP 1756 – 83.

King County Superior Court Judge John Erlick ("the trial court") presided over a four week trial before a 12-person jury. By stipulation, the sole issue to be tried to the jury was whether the class members were independent contractors or employees of FXG for purposes of both the MWA and IWA. RP 3/27/09 p.7. Neither party sought separate instructions for the two claims. Accordingly, the trial court crafted a hybrid instruction applicable to both the MWA and IWA:

INSTRUCTION NO. 9
(Employee vs. Independent Contractor)

You must decide whether the class members were employees or independent contractors when performing work for FedEx Ground. This decision requires you to determine

whether FedEx Ground controlled, or had the right to control, the details of the class members' performance of the work.

In deciding control or right to control, you should consider all the evidence bearing on the question, and you may consider the following factors, among others:

1. The degree of FedEx Ground's right to control the manner in which the work is to be performed;
2. The class members' opportunity for profit or loss depending upon each one's managerial skill;
3. The class members' investment in equipment or materials required for their tasks, or their employment of others;
4. Whether the service rendered requires a special skill;
5. The degree of permanence of the working relationship;
6. Whether the service rendered is an integral part of FedEx Ground's business;
7. The method of payment, whether by the time or by the job; and
8. Whether or not the class members and FedEx Ground believed they were creating an employment relationship or an independent contractor relationship.

Neither the presence nor the absence of any individual factor is determinative.

The trial court also instructed the jury that it should only consider "individualized" experiences to the extent they were "common to the class members:"

INSTRUCTION NO. 8 (Common Evidence)

Plaintiffs have the burden of proving that "employee" status was common to the class members during the class period. You should not consider individualized actions, conduct, or work experience unless you find that they reflect policies, procedures, or practices common to the class members during the class period.

During closing argument, plaintiffs made no objection to FXG's explanation of the jury instructions (including FXG's statement with respect to Instruction 8 that "common" meant "all") and did not seek any curative instruction. Instead, plaintiffs argued to the jury that "common" meant "frequent and widespread." RP 3/30/09 p. 56. The jury returned an 11-1 verdict in favor of FXG, finding that the class members were independent contractors. CP 2220.

The Court of Appeals reversed. As a matter "of first impression," (App., A-4), after noting that the MWA is based on the FLSA, the Court of Appeals adopted the FLSA's economic realities test for determining a worker's status under the MWA. It held that Instruction 9 (Employee v. Independent Contractor, by including other factors and referring to "right to control" in the preamble, was legally incorrect. (App., A-10).

The Court of Appeals also held that Instruction 8 (Common Evidence) "*appears* to be legally incorrect," was misleading and was "*likely* prejudicial" because it permitted FXG to argue in closing that the term "common" meant "all." (App., A-15) (emphasis added). Then, in apparent recognition of the novelity of the issue and its equivocal ruling, the Court of Appeals acknowledged "the complexity of the issue and the dearth of persuasive case law addressing the issue" and ordered that "on remand, the parties should brief the question for the trial court to decide."

(App., A-15 to A-16).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. This Court Should Grant Review to Provide Washington Businesses and Workers With a Clear Legal Standard for Determining Independent Contractor Status under the MWA and IWA, which Recognizes the Need to Examine the Totality of the Circumstances and Provides Proper Discretion to the Trial Courts.

a. The economic realities test is based on the totality of the work relationship and does not limit the jury to considering its six factors.

This Court has never defined who is an independent contractor under the MWA – an issue that affects businesses and workers statewide. RAP 13.4(b)(4). This is an issue of "first impression" in Washington. (App., A-6). Despite the potentially sweeping impact of its ruling, the Court of Appeals failed to clearly articulate the proper standard and did not recognize the non-exclusive nature of the FLSA test. The Court of Appeals' opinion provides little guidance to trial courts – which are frequently called upon to determine employer liability under the MWA – concerning the jury instruction that should be used to determine independent contractor status and a trial court's discretion in formulating such jury instructions.

Instead, the Court of Appeals sent a mixed message to the trial courts by purporting to adopt FLSA's six part "economic realities" test as the rigid standard under the MWA while simultaneously holding that

"Washington is not bound to strictly follow the [economic realities] test used by the majority of federal courts" and "acknowledg[ing] that the trial court, on remand, may hear such arguments." (App., A-13). The Court of Appeals erred in holding that the trial court lacked discretion to include other factors and to refer to the "right of control" in the instruction's preamble. (App., A-10).

This Court should accept review to establish that the FLSA's "economic realities" test provides a multi-factor, non-exclusive standard for determining employee status under the MWA, and, as the trial court held, does not preclude the jury from considering additional factors that are relevant to the parties' circumstances, including whether the defendant had the right to control the plaintiff's work.

1) The economic realities test is a non-exclusive standard.

In its analysis, the Court of Appeals appropriately started with the text of the MWA itself. The MWA, however, is of little help in defining who is an employee or independent contractor under the Act. Rather, the MWA defines "employee" in a circular manner as "any individual employed by an employer." RCW 49.46.010. The MWA has an equally unhelpful definition of the term "employ" – "to suffer or permit to work." *Id.* And, critically, there is no Department of Labor ("DLI") regulation providing guidance on the topic. *See* WAC 296-128 *et seq.* When the

legislature has not expressly spoken, common law ordinarily steps in to fill the gap.[1] RCW 4.04.010; *In re Parentage of L.B.*, 155 Wn.2d 679, 680, 122 P.3d 161 (2005).

Noting that this Court has held that FLSA case law may provide persuasive authority, the Court of Appeals looked to the FLSA for answers. *See Hisle v. Todd Pac. Shipyards*, 151 Wn.2d 853, 93 P.3d 108 (2004); *Inniss v. Tandy Corp.*, 141 Wn.2d 517, 7 P.3d 807 (2000). As the Court of Appeals concluded, FLSA cases adopt the six-factor economic realities test for determining independent contractor status. Contrary to the Court of Appeals' analysis, however, the FLSA test is not a static list of factors to be applied in rote fashion and its factors are not exclusive. *Real v. Driscoll Strawberry Assoc., Inc.,* 603 F.2d 748, 754 & n.14 (9th Cir. 1979) (The list of six FLSA factors "is not exhaustive.... The presence of any individual factor is not dispositive... a determination depends "upon the circumstances of the whole activity."). Rather, employment status under the FLSA is determined looking at the circumstances as a whole and based on all of the evidence presented,

[1] Indeed, the only applicable Washington authority for determining independent contractor status in a wage case is *Ebling*, which supports the use of the common law right to control test. *See Ebling v. Gove's Cove, Inc,* 34 Wn. App. 495, 663 P.2d 132 (1983). Many states use the common law right to control test to determine employment status for overtime wage claims. *See In re FedEx Ground Package Sys., Inc.,* 2010 U.S. Dist. LEXIS 134959 (N.D. Ind. Dec. 13, 2010) (applying common law to wage claims in 23 states and holding as a matter of law that class members were FXG independent contractors).

which is precisely what the jury did in this case. *See Brock v. Superior Care, Inc.,* 840 F.2d 1054, 1059 (2d Cir. 1988) (rejecting argument that economic realities test that considered factors in addition to those enumerated was improper "since the test concerns the totality of the circumstances, any relevant evidence may be considered, and mechanical application of the test should be avoided").

Instruction 9 included all six enumerated FLSA factors, instructed the jury that "[n]o single factor is controlling" and that "an evaluation of all incidents of the work relationship is required." CP 2195. Nevertheless, the Court of Appeals reversed the jury's verdict on the ground that the instruction was legally incorrect. The Court of Appeals rigid approach to the FLSA test ignores its non-exclusive, multi-factor nature.[2]

2) Common law factors are not inconsistent and are appropriate given the non-exclusive nature of the economic realities test.

The Court of Appeals also erred in holding that Instruction 9 improperly referred to the "right to control" in its preamble. The common

[2] When a jury instruction involves a multi-factor, non-exclusive test, the instruction need not quote each factor exactly as it appears in court opinions and may include additional factors that are supported by the evidence. *See Ernster v. Luxco, Inc.*, 596 F.3d 1000, 1005 (8th Cir. 2010) (multi-factor non-exclusive test in jury instruction derived from common law was proper statement of the law even though it did not recite factors verbatim and included additional factors); *Cristler v. Express Messenger Sys., Inc.*, 171 Cal. App. 4th 72, 85-87, 89 Cal. Rptr. 3d 34 (App. Ct. 2009), *review denied*, 209 Cal. LEXIS 5283 (2009) (instruction using multi-factor non-exclusive employment status test was proper even though it did not list the factors as they appeared in court opinions).

law test is not inconsistent with the economic realities test under FLSA. Indeed, as the Court of Appeals expressly recognized, the economic realities test "overlaps" with the common law "right of control" test and includes "control" as one of the factors. (App., A-10). The internal DLI Technical Bulletin relied upon by the Court of Appeals – which was never adopted as agency policy – actually supports Instruction 9 by recognizing that control is the most important factor of the non-exclusive factors:

> An evaluation of the relationship cannot be based on isolated factors...even the obvious presence or absence of an individual factor is not determinative, although case law suggests that the first factor on the degree of control by the business over the workers is the most important....

Plaintiffs' Statement of Additional Authorities (July 12, 2010) (Technical Bulletin at 1).[3] *See also Furtell v. Payday Cal., Inc.*, 190 Cal App. 4th 1419, 119 Cal. Rptr. 3d 513 (App. Ct. 2010) (concluding that "although the FLSA applies a slightly different test than California [common] law, the predominate factor remains the control an alleged employer exercises.")

By the same token, the additional factors in Instruction 9, including

[3] The DLI technical bulletin submitted by plaintiffs two days before the Court of Appeals' oral argument is not a regulation or even a policy statement. The bulletin is not published in the Washington State Register and is not found on DLI's website. There is no basis to conclude – as the Court of Appeals erroneously did – that the bulletin constitutes DLI's official policy or a uniformly applied interpretation of DLI. *See Wingert v. Yellow Freight Sys.,Inc.*, 146 Wn.2d 841, 850 n.1, 50 P.3d 256 (2002); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992).

the belief of the parties,[4] while not dispositive, are consistent with the goal of allowing the jury to consider the totality of the circumstances. Because Instruction 9 expressly directed the jury to consider all of the evidence bearing on employment status, the instruction was neither erroneous nor prejudicial. Accordingly, this Court should accept review and reinstate the jury's verdict.

b. Instruction 9 Correctly States the Hybrid Legal Standard for Determining Independent Contractor Status for the Plaintiffs' Claims under the MWA and IWA.

Claims under Washington's MWA are often joined with other theories of liability. Here, because the plaintiffs' MWA claim was tried together with the IWA claim, the trial court instructed the jury to determine independent contractor status for both claims. Thus, Instruction 9 was a hybrid instruction for two claims.

The Court of Appeals erred by ignoring the dual nature of claims. The distinction between the IWA and MWA is significant because each claim has a different statutory underpinning, including different definitions of employee. *See Peterson v. Hagan*, 56 Wn.2d 48, 54, 351 P.2d 127 (1960) ("The 1959 act [MWA] is entirely different from the

[4] While (incorrectly) holding that FLSA cases do not consider belief of the parties, *see* RP 3/02/09 p. 23, the Court of Appeals nonetheless acknowledged that it is appropriate for the trial court to decide on remand whether belief of the parties is a factor to include in a revised jury instruction. (App., A-13).

earlier one [IWA]."). And, while the FLSA test arguably informs the determination of independent contractor status under the MWA, it does not inform the determination under the IWA. *See*, RP 3/2/09 p. 45.

The IWA defines employee as one "who is employed in the business of the employee's employer whether by way of manual labor or otherwise." RCW 49.12.005. The DLI has adopted a regulation for the IWA that expressly excludes independent contractors from the definition of employee: "where said individuals control the manner of doing the work and the means by which the result is to be accomplished." WAC 296-126-002. The DLI's official interpretation of the term "employee" for purposes of the IWA, as enacted in regulation, has the force and effect of law.[5] *Wingert v. Yellow Freight Sys.*, 146 Wn.2d 841, 848, 50 P.3d 256 (2002). Thus, the threshold employment status test under the IWA is based on the common law right to control test.

Jury instructions are "sufficient if they allow the parties to argue their theories of the case, do not mislead the jury, and when taken as a whole, properly inform the jury of the law to be applied." *Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 1265 (2000). Instruction 9 properly stated the legal test of independent contractor status for the IWA claims (which is based on the common law right to control test), as well as

[5] Plaintiffs advocated for the right to control test by relying on this very DLI regulation in their pre-trial briefing addressing the legal standard. CP 780-81.

MWA claims based on the FLSA standard, in a single instruction.

Given the single instruction, the Court of Appeals erred in focusing on the fact that Instruction 9 did not expressly use the term "economic reality," but used the term "control or right of control" in the instruction's preamble. The essential elements of the two legal tests are correctly set forth in the instruction. As neither party sought separate instructions for the two claims, plaintiffs waived any argument that two separate instructions should have been given. The Court of Appeals erred in failing to recognize the trial court's considerable discretion in deciding how the instruction should be worded, particularly in light of the two claims at issue. *See Gammon v. Clark Equip. Co.*, 104 Wn.2d 613, 617-18, 707 P.2d 685 (1985).

In sum, the Court of Appeals' decision –adopting a rigid "exclusive factor" view of the FLSA test to govern the IWA and MWA claims – is confusing, creates uncertainty, and will undoubtedly result in another appeal after a retrial concerning the exact issues raised here. Review should be granted now to provide a clear ruling on the legal standards for determining independent contractor status under the MWA and IWA.[6] *See State v. Coe*, 101 Wn.2d 772, 788, 684 P.2d 668 (1984)

[6] The Court of Appeals also erred by simply presuming prejudice, without any further analysis. The Court of Appeals was obligated to "scrutinize the entire record...and determine whether or not the error was harmless or prejudicial." *Blaney v.*

("The phrase, when read in the context of all of the instructions, would not improperly instruct the jury...to avoid any repetition of this issue, however, the instruction should not be given in future cases.").

2. This Court Should Grant Review to Clarify that Judicial Estoppel is Not Limited to Factual Inconsistencies and the Court of Appeals Erred in Not Barring Plaintiffs from Taking Inconsistent Legal Positions.

This Court should accept review because the Court of Appeals erred in holding that the doctrine of judicial estoppel only applies to factually inconsistent statements, not to inconsistent legal positions. (App., A-14). This Court has never held that judicial estoppel applies only to factual statements. *See, e.g., Ashmore v. Estate of Duff*, 165 Wn.2d 948, 950, 205 P.3d 111 (2009) ("The gravaman of judicial estoppel is the intentional assertion of an inconsistent position that erodes respect for the judicial process and the courts."); *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 160 P.3d 13 (2007). Many courts hold that judicial estoppel applies to inconsistent *legal* positions. *See Helfand v. Gerson*, 105 F.3d 530, 535 (9th Cir. 1997) ("The integrity of the judicial process is threatened when a

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Int'l Ass'n. of Mach. & Aerospace Workers, 151 Wn.2d 203, 211, 87 P.3d 757 (2004) (quoting *State v. Britton*, 27 Wn.2d 336, 341 (1947)). Plaintiffs were free to argue, and did argue, that each of the six factors included in Instruction 9 weighed in favor of plaintiffs' claim that the class members were FXG employees. The jury was specifically directed to consider all of the evidence, and there was substantial evidence to support the jury's verdict. The jury necessarily found that FXG did not control and did not have the right to control the class members. It is difficult to imagine any scenario where a jury could conclude that there was no control, but then proceed to find employee status under the economic realities test. Omitting the "economic realities" language was not prejudicial.

litigant is permitted to gain an advantage by the manipulative assertion of inconsistent positions, factual or legal."); *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 663 (7th Cir. 2004) ("They prevailed ... by arguing that *Buford* was wrong. They are estopped to argue now that it was right.").

The Court of Appeals' decision allows litigants to play fast and loose with the integrity of the court system. Plaintiffs obtained certification of the class by arguing that the legal standard was "right to control" based on the authority of *Ebling v. Gove's Cove, Inc.*, 34 Wn. App. 495, 663 P.2d 132 (1983).[7] Then, when it came time to try the claims to the jury, plaintiffs abandoned the common law standard and argued that the jury should decide the claims by applying the economic realities test. The Court of Appeals erred in refusing to consider judicial estoppel under these circumstances. Review by this Court is necessary to address this critical issue relating to the integrity of the judicial process.

3. This Court Should Grant Review to Establish that Evidence Offered During a Class Action Jury Trial Must be Common to the Certified Class.

This Court should also accept review because the Court of Appeals' holding that the plaintiff class may establish employment status

[7] Had plaintiffs sought certification based on the multi-factor FLSA standard, it is highly unlikely that class certification would have been granted in the first place. *See In re FedEx Ground Package Sys., Inc.*, 662 F. Supp. 2d 1069, 1083 (N.D. Ind. 2009). If this Court affirms use of the FLSA standard, class certification will need to be revisited on remand.

by "representative" rather than "common" evidence raises an issue of substantial public concern. RAP 13.4(b)(4). As the Court of Appeals acknowledged this issue is "complex[]" and there is "a dearth of persuasive case law addressing the issue." (App., A-15). Review is particularly merited because the Court of Appeals' ruling, rejecting an instruction directing the jury to rely on evidence that is "common" to the class, undermines the purpose of class action lawsuits.

The Court of Appeals held that requiring the jury to consider "common," and not individualized evidence made the instruction misleading[8] and "appears" to be legally incorrect. (App., A-15). To the contrary, class action claims can not be proven using anything other than common evidence. The class action device deviates from the historic rule that each plaintiff may only litigate on his own behalf. *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 155, 102 S. Ct. 2364, 72 L.Ed. 740 (1982); *Bonanno v. Quizno's Franchise Co., LLC*, 2009 U.S. Dist. LEXIS 37702 (D. Colo. Apr. 20, 2009). In a certified class, the judgment binds the rights and duties of all absent class members. Thus, once a class is

[8] The Court of Appeals concluded that Instruction 8 was misleading because during closing argument FXG argued – without objection by the plaintiffs – that the term "common" as used in Instruction no. 8 meant "all." (App., A-15). Plaintiffs' failure to make a contemporaneous objection to a closing argument waives any error. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 333-34, 858 P.2d 1054 (1993) ("Even when portions of closing argument are improper or inaccurate, failure to make contemporaneous objections usually waives any error unless the argument was so flagrant and prejudicial as not to be subject to a curative instruction.").

certified, evidence offered to prove the merits of class claims (whether in summary judgment or at trial) must be common to the class, as a whole. As Judge Miller in the FXG MDL litigation summarized:

> In class action summary judgment motions, the drivers can't rely on individual contractors' experiences...to show FedEx's right to control drivers on a class-wide basis....Were the court to allow the plaintiffs to introduce evidence to show the substance of FedEx managers' interaction with selected drivers, it would then have to allow FedEx the opportunity to produce contradictory evidence showing that other drivers weren't treated in a similar fashion. Class actions can't be based on such individualized evidence.

In re FedEx Ground Package Sys., Inc., 734 F. Supp. 2d 557, 559-60 (N.D. Ind. 2010).[9]

The Court of Appeals similarly erred in holding that representative

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[9] The Court of Appeals distinguished Judge Miller's opinions on the ground that the classes certified in the multi-district litigation (MDL) were certified under the right to control test, not the economic realities test. (App., A-17). But evidence needed to prove claims under the economic realities test is more individualized than evidence under the right to control test. It is for this very reason that Judge Miller refused to certify class claims requiring application of the FLSA economic realities test. *In re FedEx Ground Package Sys., Inc.*, 662 F. Supp. 2d 1069, 1083 (N.D. Ind. 2009). After noting the FLSA six-part economic realities test, Judge Miller denied class certification because:

> The court must take into consideration the actual history of the parties' relationship, necessitating an individualized examination of the multiple factors relating to each drivers' employment. Because the evidence pertaining to such factors varies in material respects throughout the proposed class, there is a lack of substantial similarity among the putative class member sufficient to justify treatment as a collective action.

Id.; see also Pfaahler v. Consultants for Architects, Inc., 2000 U.S. Dist. LEXIS 1772, *4 (N.D. Il. Feb. 8, 2000) ("In order to determine who is an independent contractor and who is an employee [under the economic realities test], the court would be required to make a fact-intensive, individual determination as to the nature of each potential claimant's employment relationship."). Thus, given the individual nature of the elements of the economic realities test (and assuming that the class remains certified following remand), an instruction requiring proof by common evidence is even more necessary than it would have been in the MDL cases.

evidence could be used to establish employment status. The Court of Appeals cited only cases that permitted the use of representative evidence to establish the number of hours worked for purposes of damage calculations. (App., A-17); *See, e.g., Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 66 S. Ct. 1187, 90 L.Ed. 1515 (1946). But *Anderson,* and its progeny, have never been interpreted to establish the existence of an employment relationship, *i.e.*, whether workers are employees or independent contractors in the first place.

Nor is the use of "representative evidence" appropriate under the circumstances of this case. At trial, the testimony was highly varied. *See* Sub No. 470 (FXG's Motion to Decertify). Multiple courts have noted, even in the context of quantifying damages, that such inconsistency makes the use of representative evidence inappropriate precisely because it is not "representative."[10] The Court of Appeals' "representative evidence" test would allow plaintiffs to try their case by selecting individualized evidence from among the diverse work experiences of 320 class members,

[10] *See, e.g., Proctor v. Allsups Convenience Stores, Inc.,* 250 F.R.D. 278, 283-84 (N.D. Tex. 2008) (precluding representative evidence because "there is no consistency among the testimony, there is no consistently applied policy resulting in working off the clock, and the time spent working off the clock is not alleged to be uniform or of a predetermined duration"); *Johnson v. Big Lots Stores, Inc.*, 561 F. Supp. 2d 567, 578-88 (E.D. La. 2008) (decertifying FLSA class after trial because trial testimony revealed substantial variation among class members and "'representative' testimony was not representative of plaintiffs' experience"); *Beauperthuy v. 24 Hour Fitness USA, Inc.,* 2011 U.S. Dist. LEXIS 24768, *30-33 (N.D. Cal. Feb. 24, 2011) (decertifying FLSA class because there was not "substantial evidence of a common policy, plan or scheme").

regardless of whether their experiences apply to any other class member's experience. The unfairness of this approach was recognized in *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 344 (4th Cir. 1998), where the Fourth Circuit noted that "plaintiffs enjoyed the practical advantage of being able to litigate not on behalf of themselves, but on behalf of a 'perfect plaintiff' pieced together for litigation." As a result, the defendant "was often forced to defend against a fictional composite." *Id.* at 345.

Contrary to the Court of Appeals' assertion, the trial court did not impose a requirement that the evidence of liability be "identical," (App., A-16), only that it be "common." Its instruction properly guarded against the danger of using cherry-picked evidence in pursuit of a "perfect plaintiff" by requiring that plaintiffs tie individualized evidence to common policies, practices or procedures. If the rule were otherwise, named plaintiffs could try their claims by anecdotal evidence that had no connection to other class members. By espousing the use of "representative" evidence to prove employment status without the safeguard of requiring plaintiffs to tie such evidence to common policies and practices, the Court of Appeals embraced the very error identified in

Broussard.[11]

The rule established by the Court of Appeals defeats the efficiencies and protections intended by class certification by allowing plaintiffs to first obtain class certification by representing to the court that common proof would be used to prove the class claims but then submit individualized evidence at trial. Review by this Court is necessary to address this significant issue of class action law.

F. CONCLUSION

This Court should accept review, reverse the Court of Appeals, and affirm the jury's verdict.

[11] The Court of Appeals concluded that plaintiffs were "likely prejudiced" by Instruction 8. (App., A-15). Possible prejudice is not the standard for revising a jury instruction. Moreover, an instruction that is merely misleading does not create a presumption of prejudice. In such a circumstance, it is plaintiffs' burden to demonstrate prejudice. *State v. Aguirre*, 168 Wn.2d 350, 364, 229 P.3d 669 (2010); *Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 431, 40 P.3d 1206 (2002). Even if the Court of Appeals actually had determined that Instruction 8 was legally incorrect – instead of "appearing" to be incorrect – any instructional error was harmless. The jury heard extensive testimony by contractors that they were not employees. Thus, this was not a situation where the jury was considering whether a single contractor did not meet the legal test. Plaintiffs were simply unable to convince the jury with their evidence that the contractors were employees. The jury verdict would have been the same had Instruction 8 not been given.

Respectfully submitted this 25th day of March, 2011.

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CERTIFICATE OF SERVICE

The undersigned hereby declares as follows:

I am employed at Corr Cronin Michelson Baumgardner & Preece LLP, attorneys of record for the Petition FedEx Ground Package System, Inc. herein.

On March 25, 2011, I caused a true and correct copy of the foregoing document to be: 1) filed in the Washington State Court of Appeals, Division I and the required statute fee was made payable to the Washington State Supreme Court; and 2) duly served via Legal Messenger on the following parties:

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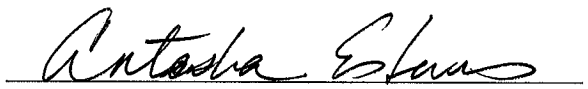
Attorneys for Respondents

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: March 25, 2011, at Seattle, Washington.



Antesha Esteves

Published Opinion dated December 20, 2010

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RANDY ANFINSON ET AL., *Appellants*, v. FEDEX GROUND PACKAGE SYSTEM, INC., ET AL., *Respondents*.

No. 63518-2-I

COURT OF APPEALS OF WASHINGTON, DIVISION ONE

159 Wn. App. 35; *244 P.3d 32*; *2010 Wash. App. LEXIS 2805*; *17 Wage & Hour Cas. 2d (BNA) 292*; *160 Lab. Cas. (CCH) P61,098*

July 14, 2010, Oral Argument
December 20, 2010, Filed

PRIOR HISTORY: [***1]

Appeal from King County Superior Court. Docket No: 04-2-39981-5. Judgment or order under review. Date filed: 04/21/2009. Judge signing: Honorable John P Erlick.

SUMMARY:

WASHINGTON OFFICIAL REPORTS SUMMARY

Nature of Action: Action for relief on claims that a company that provides ground package pickup and delivery services failed to pay overtime wages to a certain class of pickup and delivery drivers as required by the Washington Minimum Wage Act. The plaintiffs claimed that the drivers are employees under the Minimum Wage Act, not independent contractors as the company classifies them. The plaintiffs also sought reimbursement for the cost of uniforms under the industrial welfare act.

Superior Court: The Superior Court for King County, No. 04-2-39981-5, John P. Erlick, J., on April 21, 2009, entered a judgment in favor of the defendants on a verdict finding that the plaintiffs were independent contractors and not employees.

Court of Appeals: Holding that the jury was misinstructed on the standard for determining whether the plaintiffs were employees or independent contractors and on the evidentiary burden of proof at trial, the court *reverses* the judgment and *remands* the case for further proceedings.

HEADNOTES

WASHINGTON OFFICIAL REPORTS HEADNOTES

[1] Trial -- Instructions -- Sufficiency -- Test. The sufficiency of the instructions given in a jury trial is determined by whether they permit each party to argue its theory of the case, do not mislead the jury, and, when read as a whole, properly inform the jury of the applicable law.

[2] Trial -- Instructions -- Review -- Standard of Review. Jury instructions are reviewed de novo.

[3] Trial -- Instructions -- Review -- Error of Law -- Prejudice -- Necessity. An instruction that erroneously states the law requires reversal of the judgment entered in the case if a party is prejudiced by the error. The error is prejudicial if it affected the outcome of the trial.

[4] Trial -- Instructions -- Review -- Harmless Error -- Presumption -- Test. When the record of a jury trial discloses an error in an instruction given on behalf of the party in whose favor the verdict was returned, the error is presumed to have been prejudicial and furnishes a ground to reverse the judgment entered in the case unless the error affirmatively appears to have been harmless. A harmless error is an error that is trivial, formal, or merely academic; was not prejudicial to the substantial rights of the party assigning the error; and in no way affected the final outcome of the case.

[5] Trial -- Instructions -- Proposed Instructions -- Review -- Standard of Review. A trial court's decision whether to give a particular jury instruction is reviewed for abuse of discretion.

[6] Trial -- Instructions -- Sufficiency -- Number -- Review -- Standard of Review. A trial court's decision about the number of instructions to give to a jury is reviewed for abuse of discretion.

[7] Trial -- Instructions -- Sufficiency -- Wording -- Review -- Standard of Review. A trial court's decision about the specific wording of a jury instruction is reviewed for abuse of discretion.

[8] Trial -- Instructions -- Proposed Instructions -- Refusal -- Review -- Standard of Review. A trial court's refusal to give a particular instruction is an abuse of discretion if the decision is manifestly unreasonable or the court's discretion is exercised on untenable grounds or for untenable reasons.

[9] Trial -- Instructions -- Proposed Instructions -- Refusal -- Review -- Prejudice -- Inability To Argue Theory of Case. If a party's theory of the case can be argued under the instructions given as a whole, the trial court's refusal to give a requested instruction is not reversible error.

[10] Trial -- Instructions -- Proposed Instructions -- Language -- Appellate Opinion Language. The fact that a proposed jury instruction uses language from an appellate court opinion does not necessarily make the instruction a proper instruction.

[11] Employment -- Compensation -- Minimum Wage -- Overtime -- "Employee" or "Independent Contractor" -- Determination -- Mixed Question of Law and Fact -- In General. For purposes of the overtime pay provisions of the Washington Minimum Wage Act (ch. 49.46 RCW), the issue whether a worker is an "employee" or an "independent contractor" presents a mixed question of law and fact.

[12] Statutes -- Construction -- Legislative Intent -- Statutory Language -- Plain Meaning -- Context. A court's goal when interpreting statutory language is to effectuate the legislature's intent. If the statute's meaning is plain, the court will give effect to that plain meaning as the expression of the legislature's intent. In determining the plain meaning of a statutory provision, a court looks to the text of the provision and to the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole.

[13] Statutes -- Construction -- Ambiguity -- Effect. A court may resort to statutory construction, legislative history, and relevant case law to determine the legislative intent of an ambiguous statute. A statute is ambiguous if it is susceptible to more than one reasonable interpretation.

[14] Employment -- Compensation -- Minimum Wage -- Statutory Provisions -- Federal Statute -- Relationship. The Washington Minimum Wage Act (ch. 49.46 RCW) is patterned on the federal Fair Labor Standards Act of 1938 (*29 U.S.C. §§ 201-19*).

[15] Employment -- Compensation -- Minimum Wage -- Overtime -- Statutory Provisions -- Federal Statute -- Relationship. The overtime provisions of the Washington Minimum Wage Act (ch. 49.46 RCW) were amended by Laws of 1975, 1st ex. sess., ch. 289 to conform to the federal Fair Labor Standards Act of 1938 (*29 U.S.C. §§ 201-219*).

[16] Employment -- Compensation -- Minimum Wage -- Statutory Provisions -- Purpose. The purpose of the Washington Minimum Wage Act (ch. 49.46 RCW) is to provide remedial protections to workers.

[17] Statutes -- Construction -- Administrative Construction -- Deference to Agency -- Test. An agency's interpretation of a statute is entitled to great weight by a court absent a compelling indication that the agency's interpretation conflicts with the statute's legislative intent.

[18] Employment -- Compensation -- Minimum Wage -- Overtime -- "Employee" or "Independent Contractor" -- Determination -- Economic Realities Test -- Applicability. The "economic realities" test, not the common law "right to control" test, is the appropriate legal test for determining whether a worker is an "employee" or an "independent contractor" for purposes of the overtime requirement of *RCW 49.46.130(1)* of the Washington Minimum Wage Act (ch. 49.46 RCW), which entitles "employees" who work more than 40 hours in a week to overtime pay at the rate of not less than one and one half times their regular rate of pay. The common law "right to control" test was developed for purposes of tort law to define and limit an employer's vicarious liability for injuries caused by an employee and is inappropriate for determining the scope of the remedial protection afforded by the overtime pay provision of the Minimum Wage Act. The ultimate inquiry under the "right to control" test is whether the employer has the right to control the worker's performance. The ultimate inquiry under the "economic realities" test is whether, as a matter of economic reality, the worker is dependent on the alleged employer.

[19] Employment -- Compensation -- Minimum Wage -- Overtime -- "Employee" or "Independent Contrac-

tor" -- Determination -- Economic Realities Test -- Factors. The "economic realities" test for determining whether a worker is an "employee" or an "independent contractor" for purposes of the overtime requirement of *RCW 49.46.130(1)* of the Washington Minimum Wage Act (ch. 49.46 RCW) may be applied by considering the six factors used by a majority of the federal circuit courts of appeal for purposes of the federal Fair Labor Standards Act of 1938 (*29 U.S.C. §§ 201-219*): (1) the permanence of the working relationship between the parties, (2) the degree of skill the work entails, (3) the extent of the worker's investment in equipment or materials, (4) the worker's opportunity for profit or loss, (5) the degree of the alleged employer's control over the worker, and (6) whether the service rendered by the worker is an integral part of the alleged employer's business.

[20] Employment -- Compensation -- Minimum Wage -- Overtime -- "Employee" or "Independent Contractor" -- Determination -- Instructions -- Sufficiency. In a trial in which it must be determined whether a worker is an "employee" or an "independent contractor" for purposes of the overtime requirement of *RCW 49.46.130(1)* of the Washington Minimum Wage Act (ch. 49.46 RCW), it is error for the trial court to instruct the jury in a manner the defines the ultimate test as whether the putative employer had a "right of control" the worker's performance. The error is presumed to be prejudicial if the instruction was given on behalf of the defendant in whose favor the verdict was returned. The presumption is not rebutted if the instructions, viewed as a whole, did not permit the worker to argue his or her theory of the case.

[21] Estoppel -- Courts -- Judicial Estoppel -- What Constitutes -- In General. Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.

[22] Estoppel -- Courts -- Judicial Estoppel -- Applicability -- Factors. Judicial estoppel requires a court to analyze three questions: (1) whether a party's current position is inconsistent with an earlier position, (2) whether judicial acceptance of an inconsistent position in the later proceeding will create the perception that the party misled either the first or second court, and (3) whether the party asserting the inconsistent position will obtain an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

[23] Estoppel -- Courts -- Judicial Estoppel -- Applicability -- Review -- Standard of Review. A trial court's decision whether to apply the doctrine of judicial estoppel is reviewed for abuse of discretion. A trial court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds or reasons. A trial court's decision is manifestly unreasonable only if it is outside the range of acceptable choices, given the facts and the applicable legal standard.

[24] Estoppel -- Courts -- Judicial Estoppel -- Elements -- Inconsistent Factual Positions. Judicial estoppel prevents a party from taking a factual position that is inconsistent with a factual position taken in a prior proceeding. The doctrine concerns itself with inconsistent assertions of fact, not with inconsistent positions taken on points of law.

[25] Parties -- Class Actions -- Certification -- Common Questions of Law or Fact -- Legal Claims -- Judicial Estoppel -- Applicability. The doctrine of judicial estoppel does not prevent the representative plaintiff in a class action from making a legal claim at trial that is inconsistent with a legal claim that was made when class certification was sought.

[26] Trial -- Instructions -- Sufficiency -- Number -- Wording -- Discretion of Court. While a trial court has discretion with respect to the specific wording and number of jury instructions, the instructions must accurately state the law and may not mislead the jury.

[27] Trial -- Instructions -- Misleading Instruction -- Acceptance of Argument Ruled To Be Improper. A jury instruction is misleading and can be prejudicial if it allows the jury to accept an argument that the court expressly ruled could not be made.

[28] Parties -- Class Actions -- Proof of Claim -- Individualized Proof -- Necessity. The "commonality" requirement of *CR 23*, which governs class actions, pertains only to the certification of a class and does not pertain to the burden of proof at trial. Commonality for certification purposes is separate from the burden of proof in the liability phase of the action. The evidence need not be identical as to each individual class member in the liability phase. At trial, the plaintiffs may rely on testimony and evidence of representative class members to prove that the defendant's practices or policies affected similarly situated class members.

[29] Parties -- Class Actions -- Proof of Claim -- Instruction -- Validity. In the liability phase of a class action tried to a jury, it is error for the trial court to instruct the jury as follows: "Plaintiffs have the burden of proving that 'employee' status was common to the class members during the class period. You should not consider individualized actions, conduct, or work experiences unless you find that they reflect policies, proce-

dures, or practices common to the class members during the class period." Such an instruction improperly requires identical proof for each member of the class, which is not required in a class action. A class action may be proved with representative evidence from selected class members.

[30] Employment -- Compensation -- Minimum Wage -- Overtime -- "Employee" or "Independent Contractor" -- Determination -- Class Action -- Individual Proof -- Necessity. In a class action in which it must be determined whether the class members are "employees" or "independent contractors" for purposes of the overtime requirement of *RCW 49.46.130(1)* of the Washington Minimum Wage Act (ch. 49.46 RCW), it is error for the trial court to instruct the jury as follows: "Plaintiffs have the burden of proving that 'employee' status was common to the class members during the class period. You should not consider individualized actions, conduct, or work experiences unless you find that they reflect policies, procedures, or practices common to the class members during the class period." Such an instruction improperly requires identical proof for each member of the class, which is not required in a class action. The action may be proved with representative evidence from selected class members.

[31] Trial -- Verdict -- Form -- Sufficiency -- Test. A verdict form submitted to a jury is sufficient if it allows the parties to argue their theories of the case, does not mislead the jury, and, when taken as a whole, properly informs the jury of the applicable law.

[32] Trial -- Verdict -- Form -- Error of Law -- Review -- Standard of Review. An alleged error of law in a verdict form submitted to a jury is reviewed de novo.

[33] Employment -- Compensation -- Minimum Wage -- Overtime -- "Employee" or "Independent Contractor" -- Determination -- Mixed Question of Law and Fact -- Submission to Jury. The determination of whether a worker is an "employee" or an "independent contractor" for purposes of the overtime requirement of *RCW 49.46.130(1)* of the Washington Minimum Wage Act (ch. 49.46 RCW) is a mixed question of fact and law that may be submitted to a jury under proper instructions, unless the facts are undisputed and the inferences to be drawn from the undisputed facts are plain and not open to doubt by reasonable persons. Where the facts are disputed, the determination of employment status may properly be made by the jury.

[34] Costs -- Attorney Fees -- On Appeal -- Prevailing Party -- Determination -- Further Proceedings. An appellate court may decline to award attorney fees and expenses to any party on appeal if further trial proceedings are necessary to determine the prevailing party.

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JUDGES: AUTHOR: Ronald Cox, J. WE CONCUR: Stephen J. Dwyer, C.J., Mary Kay Becker, J.

OPINION BY: Ronald Cox

OPINION

[*41] **[**35]** ¶1 COX, J. -- Jury instructions are sufficient if they permit each party to argue their theory of the case, do not **[*42]** mislead the jury, and when read as a whole, properly inform the jury of the applicable law. [1] Here, pickup and delivery **[***2]** drivers working for FedEx Ground Package System Inc. sued for relief under the Washington Minimum Wage Act (MWA), chapter 49.46 RCW, on behalf of themselves and other drivers similarly situated. They claim a right to overtime pay and attorney fees. They also seek reimbursement for the expenses of their uniforms under the industrial welfare act (IWA), *RCW 49.12.450*.

1 *Cox v. Spangler, 141 Wn.2d 431, 442, 5 P.3d 1265 (2000).*

¶2 The primary issue in this case of first impression is whether the court properly instructed the jury on the legal standard for determining whether the drivers are employees or independent contractors for purposes of the MWA. Other jury instructions are also at issue. For the reasons that follow, we affirm in part, reverse in part, and remand for further proceedings.

¶3 Randy Anfinson and two other drivers sued FedEx in December 2004, seeking relief on behalf of themselves and others similarly situated. The trial court granted their motion to certify this case under *CR 23* as a class action on behalf of approximately 320 FedEx drivers (collectively Anfinson). The class is defined as

> all persons who performed services as a pick up and delivery driver, or "contractor," for defendant during the **[***3]** class period (December 21, 2001 through December 31, 2005) who signed (or did

> so through a personal corporate entity) a FedEx operating agreement and who handled a single route at some point during the class period; excluding persons who only performed or filled one or more of the following positions during the class period: multiple route contractors, temporary drivers, line-haul [**36] drivers, or who worked for another contractor. [2]

2 Clerk's Papers at 217.

¶4 Anfinson seeks overtime wages under the MWA for a period commencing three years prior to December 2004, when this action was filed. The essence of this claim is that the FedEx drivers are "employees" under the MWA, not [*43] "independent contractors" as the company classifies them. Anfinson also seeks attorney fees under the MWA and other statutes.

¶5 Anfinson also seeks reimbursement for the cost of uniforms under the IWA, *RCW 49.12.450*. The parties stipulated that if the jury determined that the class members were employees and not independent contractors, FedEx would be liable for overtime wages under the MWA and uniform reimbursement under the IWA. [3]

3 Report of Proceedings (Mar. 27, 2009) at 7.

¶6 The court bifurcated the trial into two phases. [***4] The first phase was the liability phase and the second phase was to have addressed damages.

¶7 A central issue for the liability phase was how the trial court should instruct the jury on the legal standard for whether the drivers are employees of FedEx or independent contractors. The court, drawing on submissions from the parties and its own research, fashioned a preliminary and a final instruction for the jury on this question. They were worded substantially the same. These instructions are the primary issue on appeal.

¶8 After a four week trial on liability issues, the jury returned a defense verdict for FedEx. The jury decided that the class members were independent contractors, not employees. [4] The court entered judgment on that verdict, dismissing the case. [5]

4 Clerk's Papers at 2220.
5 Clerk's Papers at 2383-85.

¶9 Anfinson appeals.

JURY INSTRUCTIONS

¶10 Anfinson challenges both the trial court's decisions to give certain instructions and its refusal to give others. We agree with some of these challenges and disagree with others.

[*44] [1] ¶11 Jury instructions are sufficient if they permit each party to argue their theory of the case, do not mislead the jury, and when read as a whole, properly inform the jury of [***5] the applicable law. [6] No more is required. [7]

6 *Cox, 141 Wn.2d at 442.*
7 *Leeper v. Dep't of Labor & Indus., 123 Wn.2d 803, 809, 872 P.2d 507 (1994).*

[2-4] ¶12 "On appeal, jury instructions are reviewed de novo, and an instruction that contains an erroneous statement of the applicable law is reversible error where it prejudices a party." [8] An error is prejudicial if it affects the outcome of the trial. [9]

> "When the record discloses an error in an instruction given on behalf of the party in whose favor the verdict was returned, the error is presumed to have been prejudicial, and to furnish ground for reversal, unless it affirmatively appears that it was harmless. ...
>
> "A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." [10]

8 *Cox, 141 Wn.2d at 442.*
9 *State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977).*
10 *Id.* (emphasis omitted) (alteration in original) (quoting *State v. Golladay, 78 Wn.2d 121, 139, 470 P.2d 191 (1970)*).

[5-7] ¶13 In contrast, a trial court's decision whether to give a particular instruction to the jury is a matter that we review only for abuse of discretion. [11] The abuse of discretion standard also applies to questions about the number [***6] of instructions and the specific wording of instructions. [12]

11 *Stiley v. Block, 130 Wn.2d 486, 498, 925 P.2d 194 (1996).*
12 *Hue v. Farmboy Spray Co., 127 Wn.2d 67, 92, 896 P.2d 682 (1995).*

[**37] [8, 9] ¶14 Refusal to give a particular instruction is an abuse of discretion only if the decision was "manifestly unreasonable, or [the court's] discretion was exercised on [*45] untenable grounds, or for untenable reasons." [13] If a party's theory of the case can be argued under the instructions given as a whole, then a trial court's refusal to give a requested instruction is not reversible error. [14]

13 *Boeing Co. v. Harker-Lott, 93 Wn. App. 181, 186, 968 P.2d 14 (1998).*
14 *Van Cleve v. Betts, 16 Wn. App. 748, 756, 559 P.2d 1006 (1977).*

[10] ¶15 The fact that a proposed jury instruction includes language used by a court in the course of an opinion does not necessarily make it a proper jury instruction. [15]

15 *Swope v. Sundgren, 73 Wn.2d 747, 750, 440 P.2d 494 (1968)*; *Hammond v. Braden, 16 Wn. App. 773, 776, 559 P.2d 1357 (1977).*

Preliminary Instruction and Instruction 9

¶16 Anfinson's primary argument is that the court's preliminary instruction, as well as instruction 9 (collectively Instruction 9), misstates the law. Specifically, the class [***7] members argue that this instruction erroneously states the legal standard for distinguishing between employees and independent contractors for purposes of the MWA. Anfinson argues Instruction 9, which focuses on whether an employer has the "right to control the details of the class members' performance of the work" is incorrect. We hold that Instruction 9 incorrectly states the law and was prejudicial to Anfinson.

¶17 In considering Anfinson's arguments, we have several preliminary observations. First, the question whether the FedEx drivers are employees or independent contractors for purposes of the MWA is a question of first impression in Washington. Second, there are a wide variety of approaches in other states that have considered the same or similar questions. [16] Third, in contrast to the multiplicity of approaches by various states, the Supreme Court and all [*46] federal circuits agree that "the economic realities" test is the applicable test for the Fair Labor Standards Act of 1938 (FLSA), *29 U.S.C. §§ 201-219*, on which the MWA is based. [17] Finally, Anfinson submitted supplemental authority during this appeal stating the approach taken by the Washington Department of Labor and Industries (DLI) on this question. [18] [***8] For the reasons that we explain later in this opinion, that authority from DLI is helpful in deciding this question.

16 *See* Opinion and Order, *In re FedEx Ground Package Sys., Inc., Emp't Practices Litig., No. 3:05-MD-527 RM (MDL-1700), 2008 WL 7764456, 2008 U.S. Dist. LEXIS 112104 (N.D. Ind. Mar. 25, 2008, clarified July 31, 2008)* (discussing the test applied to determine employment status in Alabama, Arkansas, California, Florida, Illinois, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, and Wisconsin).
17 *See Bartels v. Birmingham, 332 U.S. 126, 130, 67 S. Ct. 1547, 91 L. Ed. 1947, 1947-2 C.B. 174 (1947)*; *Donovan v. Agnew, 712 F.2d 1509, 1510 (1st Cir. 1983)*; *Brock v. Superior Care, Inc., 840 F.2d 1054, 1058-59 (2d Cir. 1988)*; *Donovan v. DialAmerica Mktg., Inc., 757 F.2d 1376, 1383 (3d Cir. 1985)*; *Steelman v. Hirsch, 473 F.3d 124, 128 (4th Cir. 2007)*; *Herman v. Express Sixty-Minutes Delivery Serv., Inc., 161 F.3d 299, 303 (5th Cir. 1998)*; *Donovan v. Brandel, 736 F.2d 1114, 1117 (6th Cir. 1984)*; *Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1535 (7th Cir. 1987)*; *Blair v. Wills, 420 F.3d 823, 829 (8th Cir. 2005)*; [***9] *Donovan v. Sureway Cleaners, 656 F.2d 1368, 1370 (9th Cir. 1981)*; *Dole v. Snell, 875 F.2d 802, 805 (10th Cir. 1989)*; *Brouwer v. Metro. Dade County, 139 F.3d 817, 818-19 (11th Cir. 1998).*
18 Statement of Additional Authorities by Appellants/Plaintiffs (July 12, 2010); *RAP 10.8.*

[11] ¶18 That said, we focus first on the question of what legal standard should control, for purposes of the MWA, whether one is an "employee" or an "independent contractor." This is a mixed question of fact and law. [19]

19 *See Graves v. P.J. Taggares Co., 94 Wn.2d 298, 302-03, 616 P.2d 1223 (1980)* ("'Whether a relationship is one of agency or independent contractorship can only be decided as a matter of law where there are no facts in dispute and the facts are susceptible of only one interpretation.'" (quoting *Larner v. Torgerson Corp., 93 Wn.2d 801, 804, 613 P.2d 780 (1980)*)); *Brock, 840 F.2d at 1059* ("The existence and degree of each factor is a question of fact while the legal conclusion to be drawn from those facts--whether workers are employees or independent contractors--is a question of law.").

¶19 Here, the trial court's Instruction 9 states:

> [**38] You must decide whether the class members were ***employees or independent contractors*** [***10] when per-

forming work for FedEx Ground. ***This decision requires you to determine whether FedEx Ground controlled, or had the right to control, the details of the class members' performance of the work.***

[*47] In deciding ***control or right to control***, you should consider all the evidence bearing on the question, and you may consider the following factors, among others:

> 1. The degree of FedEx Ground's right to control the manner in which the work is to be performed;
>
> 2. The class members' opportunity for profit or loss depending upon each one's managerial skill;
>
> 3. The class members' investment in equipment or materials required for their tasks, or their employment of others;
>
> 4. Whether the service rendered requires a special skill;
>
> 5. The degree of permanence of the working relationship;
>
> 6. Whether the service rendered is an integral part of FedEx Ground's business;
>
> 7. The method of payment, whether by the time or by the job; and
>
> 8. Whether or not the class members and FedEx Ground believed they were creating an employment relationship or an independent contractor relationship.

Neither the presence nor the absence of any individual factor is determinative. [20]

20 Clerk's Papers at 2195 (emphasis added).

¶20 The **[***11]** overtime wage provision of the MWA that is primarily at issue for purposes of Instruction 9 is former *RCW 49.46.130* (1998). That statute states in relevant part:

> (1) Except as otherwise provided in this section, no ***employer*** shall ***employ*** any of his [or her] ***employees*** for a work week longer than forty hours unless such ***employee*** receives compensation for his [or her] employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he [or she] is employed. [21]

21 (Emphasis added.)

¶21 *RCW 49.46.010*, the definitional section of the MWA, states:

> **[*48]** (3) "***Employ***" includes to permit to work;
>
> (4) "***Employer***" includes any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee;
>
> (5) "***Employee***" includes any individual employed by an employer ... . [A list of specific exclusions follows, none of which apply to this case.] [22]

22 (Emphasis added.)

[12, 13] ¶22 In interpreting statutory language, our goal is to effectuate the legislature's intent. [23] Where a statute's meaning is plain, we give effect to that plain meaning as the expression of the legislature's **[***12]** intent. [24] "In determining the plain meaning of a provision, we look to the text of the statutory provision in question as well as 'the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.'" [25] If the statute is susceptible to more than one reasonable interpretation, "it is ambiguous and we 'may resort to statutory construction, legislative history, and relevant case law' to resolve the ambiguity." [26]

23 *Bostain v. Food Express, Inc., 159 Wn.2d 700, 708, 153 P.3d 846 (2007)* (citing *State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005)).*
24 *Id.* (citing *Jacobs, 154 Wn.2d at 600*).
25 *In re Pers. Restraint of Cruze, 169 Wn.2d 422, 427, 237 P.3d 274 (2010)* (quoting *Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)).*
26 *Id.* (quoting *Christensen v. Ellsworth, 162 Wn.2d 365, 373, 173 P.3d 228 (2007)).*

¶23 The above definitions provide little guidance for determining whether an employment relationship exists in any particular case for purposes of the MWA. We thus turn to the established rules of statutory construction to address that question.

[39]** ¶24 In analyzing these provisions of the MWA, we are guided by our supreme **[***13]** court's decision in *Stahl v. Delicor of* **[*49]** *Puget Sound, Inc.* [27] That case involved a class claim that Delicor's commission plan violated the MWA provisions respecting overtime wages. [28] At issue was whether delivery drivers and vending machine stockers were exempt workers under the retail sales exemption of the MWA, *RCW 49.46.130(3).* [29] The supreme court ultimately held that the legislature intended that all employees of retail and service establishments could be paid under the retail sales exemption regardless of their duties. [30]

27 *148 Wn.2d 876, 64 P.3d 10 (2003).*
28 *Id. at 879.*
29 *Id.*
30 *Id. at 886-87.*

¶25 The supreme court's analysis of *RCW 49.46.130(3)* is helpful here because *RCW 49.46.130(1),* a related section, is at issue in this case. In *Stahl,* the supreme court stated that in enacting the MWA, "the legislature broadly defined employee in *RCW 49.46.010(5)* to include any individual employed by an employer." [31] The court also stated that "the legislature used the term 'any' to modify 'employee,' and Washington courts have consistently interpreted the word 'any' to mean 'every' and 'all.'" [32] Thus, the broad sweep of the statute evidences its remedial purpose. [33]

31 *Id. at 884.*
32 *Id. at 884-85.*
33 *Id. at 881.*

¶26 It **[***14]** is also significant that the supreme court noted both that the MWA is "based on the Fair Labor Standards Act of 1938 (FLSA)," and that a review of that act supported the court's conclusions regarding the MWA. [34] Moreover, the court observed that its interpretation of the MWA was consistent with the then current interpretation of the MWA by the DLI. [35]

34 *Id. at 885; see also Drinkwitz v. Alliant Techsystems, Inc., 140 Wn.2d 291, 298, 996 P.2d 582 (2000); Inniss v. Tandy Corp., 141 Wn.2d 517, 524, 7 P.3d 807 (2000).*
35 *Stahl, 148 Wn.2d at 886.*

[*50] ¶27 In view of the supreme court's reliance on the FLSA in analyzing the MWA in *Stahl* and other cases, [36] review of the history of both statutes is helpful to our task here.

36 *Id. at 886; Inniss, 141 Wn.2d at 523-34; Drinkwitz, 140 Wn.2d at 298.*

¶28 The legislature enacted the MWA in 1959. [37] Subject to specific exclusions that are not at issue here, the MWA requires employers to pay their employees overtime pay for the hours they work over 40 hours per week. [38]

37 LAWS OF 1959, ch. 294. Subsequent amendments have not materially altered the definitions of "employ" or "employee."
38 *RCW 49.46.130; Drinkwitz, 140 Wn.2d at 299.*

[14, 15] ¶29 The MWA, including its definitions, is **[***15]** patterned on the FLSA. [39] The FLSA defines the term "employ" as "includes to suffer or permit to work," [40] and "employee" as "any individual employed by an employer." [41] A respected commentator has observed that many of the provisions of the MWA are identical or comparable to the FLSA provisions. [42] In addition, the Washington Legislature **[**40]** amended the overtime provisions of the MWA to conform to the FLSA in 1975. [43]

39 *Stahl, 148 Wn.2d at 885; Inniss, 141 Wn.2d at 523-24; Drinkwitz, 140 Wn.2d at 298; see also* Cornelius J. Peck, *Labor Law,* 34 WASH. L. REV. 316, 317 nn. 5 & 6 (1959) (citing provisions adopted directly from the FLSA and provisions based in large part on the FLSA).
40 *29 U.S.C. § 203(g).*
41 *29 U.S.C. § 203(e)(1).* This definition is followed by enumerated exceptions, none of which is relevant here.
42 Professor Cornelius Peck authored a comment on the MWA in the *Washington Law Review* the year that the MWA was enacted. He observed that many of the provisions of that statute, including the definitions of "employ," "employer," and "employee," were adopted from the FLSA. Peck, *supra,* at 317. Professor Peck fur-

ther noted that the MWA provided that compliance with the FLSA "shall [***16] be deemed to constitute compliance with crucial sections of the [MWA]." Peck, *supra*, at 316-17.

43 *See Inniss, 141 Wn.2d at 523-24*; LAWS OF 1975, ch. 289 (conforming state minimum wage laws to federal laws).

[16-20] ¶30 The FLSA was enacted in 1938 for the purposes of remedying low wages and long working hours. [44] Recognizing these broad remedial purposes, the United [*51] States Supreme Court has held that common-law distinctions between employees and independent contractors are not determinative for the purpose of FLSA coverage. [45] Instead, the test for purposes of the FLSA is whether the worker is an employee as a matter of economic reality. [46] Federal courts have identified certain factors that are useful in deciding whether a worker is an employee as a matter of economic reality. [47] These courts have held that no single factor is determinative, but that the test depends "upon the circumstances of the whole activity" and ultimately, whether as a matter of economic reality, the individual is dependent on the business to which he renders service. [48]

44 *United States v. Silk, 331 U.S. 704, 713, 67 S. Ct. 1463, 91 L. Ed. 1757 (1947).*

45 *Id.*; *Bartels, 332 U.S. at 130*; *United States v. Rosenwasser, 323 U.S. 360, 362-63, 65 S. Ct. 295, 89 L. Ed. 301 (1945).*

46 *See,* [***17] *e.g., Real v. Driscoll Strawberry Assocs., 603 F.2d 748, 754 (9th Cir. 1979).*

47 *See Sureway Cleaners, 656 F.2d at 1370*; *Real, 603 F.2d at 754.*

48 *Rutherford Food Corp. v. McComb, 331 U.S. 722, 730, 67 S. Ct. 1473, 91 L. Ed. 1772 (1947)*; *see also Bartels, 332 U.S. at 130*; *Sureway Cleaners, 656 F.2d at 1370.*

¶31 In contrast to the economic realities test, the common law "right to control" test for determining whether a worker is an employee or an independent contractor is derived from the common law of torts. [49] The distinction between independent contractors and employees arose at common law to limit the principal's vicarious liability for the misconduct of a person rendering service to the principal. [50] In this context, the principal's supervisory power was crucial because "[t]he extent to which the employer had a right to control [the details of the service] activities was ... highly relevant to the question [of] whether the employer ought to be legally liable" for the worker's actions. [51]

49 *Massey v. Tube Art Display, Inc., 15 Wn. App. 782, 785-88, 551 P.2d 1387 (1976).*

50 *Id.*

51 1C ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 43.42, at 8-20 (1986).

¶32 The purpose of the distinction between [***18] an employee and an independent contractor is thus substantially different [*52] in these two areas of law. While the common law "right to control" test was developed to define an employer's liability for injuries caused by his employee, the purpose of the MWA is to provide remedial protections to workers. [52] As discussed above, federal courts have recognized that this distinction between tort policy and social legislation policy justifies a departure from common law principles when an employer claims that a worker is excluded as an independent contractor from a statute protecting "employees." There is no reason to conclude that state law should not also recognize the differences in the policies underlying tort law and this remedial legislation.

52 *Compare Massey, 15 Wn. App. at 787-88* ("'[R]ight to control the negligent actor's physical conduct of the performance of the service'" constitutes the test. (emphasis omitted) (quoting *Baxter v. Morningside, Inc., 10 Wn. App. 893, 895-96, 521 P.2d 946 (1974)*)), *with Bostain, 159 Wn.2d at 712* (remedial statutes in Title 49 RCW should be liberally construed to carry out the legislature's goal of protecting employees), *and Stahl, 148 Wn.2d at 881* ("Employer exemptions from remedial legislation such as the MWA will be 'narrowly construed [***19] and applied only to situations which are plainly and unmistakably consistent with the terms and spirit of the legislation.'" (quoting *Drinkwitz, 140 Wn.2d at 301*)).

¶33 The economic realities test used by a majority of the federal circuits has six factors. [53] They are:

> (1) the permanence of the working relationship between the parties;
>
> [**41] (2) the degree of skill the work entails;
>
> (3) the extent of the worker's investment in equipment or materials;
>
> (4) the worker's opportunity for profit or loss;
>
> (5) the degree of the alleged employer's control over the worker;
>
> (6) whether the service rendered by the worker is an integral part of the alleged employer's business. [54]

53 *See, e.g., Brock, 840 F.2d at 1058-59; DialAmerica Mktg., 757 F.2d at 1383; Brandel, 736 F.2d at 1117; Lauritzen, 835 F.2d at 1535; Sureway Cleaners, 656 F.2d at 1370; Dole, 875 F.2d at 805.*

54 *Brock, 840 F.2d at 1058-59; DialAmerica Mktg., 757 F.2d at 1383; Brandel, 736 F.2d at 1117; Lauritzen, 835 F.2d at 1535; Sureway Cleaners, 656 F.2d at 1370; Dole, 875 F.2d at 805.*

[*53] ¶34 Instruction 9 includes introductory language from the common law "right to control" test for distinguishing between agents and independent contractors, which is stated in Washington Pattern Jury Instruction (WPI) 50.11.01. [55] The first six numbered factors that follow the introductory language are adopted from the FLSA "economic realities" test used by the majority of the federal **[***20]** circuits. [56] Factor seven is from a Washington tort case. [57] Factor eight is from a California case. [58] In short, this instruction is a mix of federal and state common law factors.

55 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 50.11.01, at 458-59 (5th ed. 2005) (WPI).

56 These factors appear to be adopted from *Sureway Cleaners, 656 F.2d at 1370*, a FLSA case.

57 This factor appears to be adopted from *Hollingbery v. Dunn, 68 Wn.2d 75, 81, 411 P.2d 431 (1966)* and WPI 50.11.01.

58 This factor appears to be adopted from *Hollingbery, 68 Wn.2d 75*, WPI 50.11.01, and *Estrada v. FedEx Ground Package Sys., Inc., 154 Cal. App. 4th 1, 10, 64 Cal. Rptr. 3d 327 (2007).*

¶35 The common-law and "economic realities" tests overlap to some extent. For example, the first factor of the economic realities test, the "right to control," is essentially the same as the common-law test. But the primary focus of the two tests is different. Under Washington's common-law test, the ultimate inquiry is whether the employer has the right to control the worker's performance. [59] Under the FLSA test, in contrast, the ultimate inquiry is whether, as a matter of economic reality, the worker is dependent on the alleged employer. [60]

59 WPI 50.11.01; **[***21]** *Ebling v. Gove's Cove, Inc., 34 Wn. App. 495, 663 P.2d 132 (1983); Hollingbery, 68 Wn.2d at 80.*

60 *Sureway Cleaners, 656 F.2d at 1370.*

¶36 With these considerations in mind, we hold that the economic realities test used by the majority of the federal circuits should be the proper legal test for determining whether a worker is an employee under the MWA. Instruction 9, while including some factors drawn from this test, **[*54]** defines the ultimate test for determining whether a worker is an "employee" under the MWA as the "right of control" over the worker's performance. This is legally incorrect.

¶37 *Stahl* and other supreme court cases make clear that Washington's MWA is patterned on the FLSA. Given this and the legislative history of the MWA, we conclude that the federal test of "economic realities" used by a majority of the federal circuit courts is most persuasive, given the parallel remedial purposes of the state and federal acts.

¶38 In *Stahl*, the supreme court also looked to DLI's then current interpretation of *RCW 49.46.130* for guidance. [61] So do we for purposes of our analysis here.

61 *Stahl, 148 Wn.2d at 886.*

¶39 DLI has substantially adopted the six factor economic realities test used by the majority of **[***22]** federal circuits as the interpretive rubric through which to distinguish employees from independent contractors. [62] DLI is the state agency charged with interpreting and carrying out Washington's minimum wage laws. [63] We give great weight to an agency's interpretation of a statute absent a compelling indication that its interpretation conflicts with the legislative intent. [64]

62 Statement of Additional Authorities by Appellant/Plaintiffs at 1 (Technical Bulletin No. 11 dated November 10, 2009).

63 *RCW 49.46.010, .040, .090(2).*

64 *Wash. Water Power Co. v. Wash. State Human Rights Comm'n, 91 Wn.2d 62, 68-69, 586 P.2d 1149 (1978).*

[42]** ¶40 The six factors that DLI identifies for that test are:

> 1. The degree of control that the business has over the worker.
>
> 2. The worker's opportunity for profit or loss depending on the worker's managerial skill.
>
> 3. The worker's investment in equipment or material.
>
> 4. The degree of skill required for the job.
>
> 5. The degree of permanence of the working relationship.

[*55] 6. The degree to which the services rendered by the worker are an integral part of the business. [65]

DLI's adoption of this test is an additional reason for our conclusion that the "economic realities" test is the proper [***23] test to use for purposes of the MWA. [66]

65 Statement of Additional Authorities by Appellant/Plaintiffs at 1 (Technical Bulletin No. 11 dated November 10, 2009).

66 This is also consistent with the approach adopted by a number of other states, including Pennsylvania, New Mexico, Maine, Illinois, Michigan, Alaska, and Oregon, which all look to the FLSA for the relevant test. *Bureau of Labor Law Compliance v. Stuber, 822 A.2d 870 (Pa. Commw. Ct. 2003), aff'd, 859 A.2d 1253 (Pa. 2004)*; *Garcia v. Am. Furniture Co., 101 N.M. 785, 789, 689 P.2d 934 (1984)*; *People ex rel. Dep't of Labor v. MCC Home Health Care, Inc., 339 Ill. App. 3d 10, 19-21, 790 N.E.2d 38, 273 Ill. Dec. 896 (2003)*; *Buckley v. Prof'l Plaza Clinic Corp., 281 Mich. App. 224, 234, 761 N.W.2d 284 (2008)*; *Jeffcoat v. Dep't of Labor, 732 P.2d 1073, 1075 (Alaska 1987)*; *Presley v. Bureau of Labor & Indus., 200 Or. App. 113, 117, 112 P.3d 485 (2005)*; *see also Dir. of Bureau of Labor Standards v. Cormier, 527 A.2d 1297, 1299-1300 (Me. 1987)*; *Andrews v. Kowa Printing Corp., 351 Ill. App. 3d 668, 677-78, 814 N.E.2d 198, 286 Ill. Dec. 548 (2004)*.

¶41 Because this instructional error was given on behalf of the party in whose favor [***24] the verdict was returned, we presume that it was prejudicial. Therefore, we reverse.

¶42 FedEx argues that Anfinson was still able to argue effectively its theory of the case under Instruction 9 because of the presence of the six factors used by the majority of federal circuits. But Instruction 9 clearly states that the "right to control" is determinative. Thus, Anfinson could not effectively argue that the six factors of the "economic realities" test were determinative. This is particularly true in light of the presence of two additional factors in this instruction, neither of which is considered in the economic realities test. Our review of the final arguments by the parties supports our conclusion that this instruction was prejudicial to Anfinson.

¶43 FedEx relies on *Ebling v. Gove's Cove* [67] to support the giving of Instruction 9. That case is distinguishable and not persuasive for purposes of the MWA. There, Ebling was fired by his employer, who then failed to pay him the agreed [*56] commission for work Ebling had previously performed. [68] Ebling sued for damages plus double damages and attorney fees pursuant to wage and hour statutes, *RCW 49.52.050(2)* and *RCW 49.52.070*. [69] Ebling prevailed and [***25] his employer appealed. [70] This court affirmed, concluding that Ebling was an employee of Gove's Cove, not an independent contractor. The court used the common law "right to control" test articulated in *Hollingbery v. Dunn* [71] in determining that Ebling was an employee. [72]

67 *34 Wn. App. 495, 663 P.2d 132 (1983).*
68 *Id. at 497.*
69 *Id.*
70 *Id.*
71 *68 Wn.2d 75, 411 P.2d 431 (1966).*
72 *Ebling, 34 Wn. App. at 498.*

¶44 First, the court's analysis gives no indication that either party argued that any test for distinguishing employees from independent contractors other than the common law test should apply. Second, it is significant that the statutory framework in the wage and hour laws at issue in *Ebling* is not based on the FLSA. Thus, there was no reason for that court to consider the persuasive authority of the FLSA on that state law.

¶45 Third, *Hollingbery*, on which *Ebling* relied, sets forth the common law standard [**43] for determining whether a worker is an employee or an independent contractor in Washington in the context of tort law. [73] There, our supreme court adopted the *Restatement (Second) of Agency* § 220(2) (1958) as setting forth the relevant factors to be considered in determining whether a worker is an employee [***26] in the context of determining respondeat superior liability. [74] As we explained earlier in this opinion, the definition of an "employee" under the MWA is distinct and broader than the definition of an "employee" under the doctrine of respondeat superior in tort law.

73 *Hollingbery, 68 Wn.2d at 76, 79-80.*
74 *Id. at 80-81.*

[*57] ¶46 For these reasons, neither the reasoning in *Ebling* nor *Hollingbery* is persuasive with respect to the question of what legal standard should be used to distinguish an "employee" from an "independent contractor" under the MWA.

¶47 We note that the record indicates that the trial court also gave particular weight to the application of California's common law test in *Estrada v. FedEx Ground Package System, Inc.* [75] and *S.G. Borello & Sons, Inc. v. Dep't of Industrial Relations*. [76] Neither case is helpful here.

75 *154 Cal. App. 4th 1, 64 Cal. Rptr. 3d 327 (2007).*
76 *48 Cal. 3d 341, 769 P.2d 399, 256 Cal. Rptr. 543 (1989).*

¶48 In *Estrada*, a case seeking reimbursement for work-related expenses under the California Labor Code, the court accepted *Borello* as stating the applicable standard for determining whether a worker is an employee or an independent contractor because no party disputed the applicability of that [***27] test. [77] But *Borello* is not on point for the question that must be addressed by this court: what test should be applied under Washington's MWA?

77 *Estrada, 154 Cal. App. 4th at 11.*

¶49 *Borello* addressed whether a class of workers qualified as employees under the California Workers Compensation Law, *CAL. LAB. CODE §§ 3200-5955*. That act defines an "employee" as including most "persons 'in the service of an employer under any ... contract of hire,'" [78] but excludes "independent contractors," who are defined as "'any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished.'" [79]

78 *Borello, 48 Cal. 3d at 349* (alteration in original) (quoting *CAL. LAB. CODE § 3351*).
79 *Id.* (quoting *CAL. LAB. CODE § 3353*).

¶50 As the *Borello* court plainly stated, the act excludes "independent contractors" from coverage and "inserts the [*58] common law 'control-of-work' test in the statutory definition." [80] Although the court went on to indicate that case law extends "these principles to other 'employee' legislation as well," it is clear that the analysis in *Borello* was derived from statutory definitions that differ from those in Washington. [81]

80 *Id. at 350.*
81 *Id.*

¶51 The distinction between the California [***28] Labor Code and Washington's MWA was recently made even clearer in *Martinez v. Combs*, [82] a California Supreme Court decision that was filed after the parties in this case submitted their briefs on appeal. There, the California Supreme Court explained its reasons for rejecting the application of the "economic realities" test to a claim for minimum wage coverage: the genesis of California's minimum wage laws is distinct from the FLSA. [83] The court held that the California law does not incorporate the federal definition of "employment." [84] Specifically, the court pointed out that California adopted its minimum wage laws in 1913, several decades [**44] before the FLSA was enacted. [85] It stated that the revised definition of "employer" in the California law is intended to "***distinguish*** [the] state wage law from its federal analogue, the FLSA." [86]

82 *49 Cal. 4th 35, 231 P.3d 259, 109 Cal. Rptr. 3d 514 (2010).*
83 *Id. at 48-52.*
84 *Id. at 52-66* ("In no sense is the [Industrial Welfare Commission's] definition of the term 'employ' based on federal law.").
85 *Id. at 52-55.*
86 *Id. at 59* (emphasis added).

¶52 Because the California Labor Code and minimum wage laws are not patterned on the FLSA, the trial court incorrectly relied on the California courts' articulation of [***29] that state's common law test for distinguishing between an employee and an independent contractor under the MWA.

[*59] ¶53 Anfinson also argues that factors three and eight of Instruction 9 incorrectly state the applicable law. We agree in part.

¶54 Anfinson first argues that factor three of Instruction 9 should have referred to the "relative" investments of the parties. While all federal circuits agree that the economic realities test is the proper test, [87] only the Fifth Circuit states relative investment of the parties as one of six factors to be used in determining the economic realities of the relationship between the parties. [88] We conclude that the test in Washington should be based on the test articulated by the majority of the federal circuit courts and that the "relative" investment of the parties is not articulated in that test. [89] Accordingly, we reject Anfinson's challenge to that part of Instruction 9.

87 *See Bartels, 332 U.S. at 130*; *Agnew, 712 F.2d at 1510*; *Brock, 840 F.2d at 1058-59*; *DialAmerica Mktg., 757 F.2d at 1383*; *Steelman, 473 F.3d at 128*; *Herman, 161 F.3d at 303*; *Brandel, 736 F.2d at 1117*; *Lauritzen, 835 F.2d at 1535*; *Blair, 420 F.3d at 829*; *Sureway Cleaners, 656 F.2d at 1370*; [***30] *Dole, 875 F.2d at 805*; *Brouwer, 139 F.3d at 818-19.*
88 *See, e.g., Herman, 161 F.3d at 303.*
89 *See Brock, 840 F.2d at 1058-59*; *DialAmerica Mktg., 757 F.2d at 1383*; *Brandel, 736 F.2d at 1117*; *Lauritzen, 835 F.2d at 1535*; *Sureway Cleaners, 656 F.2d at 1370*; *Dole, 875 F.2d at 805.*

¶55 Anfinson next argues that factor eight of Instruction 9, the belief of the parties, is not a relevant factor under the FLSA test used by the majority of the federal circuits. We agree.

¶56 While Washington is not bound to strictly follow the test used by the majority of federal circuits, that test is persuasive. We have heard no persuasive argument why that test should not be used here. However, we acknowledge that the trial court, on remand, may hear such arguments, and we do not prejudge any ruling the trial court may make on that question.

[*60] *Anfinson's Proposed Instruction 13C*

¶57 Anfinson next argues that the court abused its discretion by refusing to give his proposed instruction 13C. We disagree.

¶58 Proposed instruction 13C states:

> In order to determine whether class members are employees or independent contractors, you should consider the following six factors:
>
> (1) the degree of the alleged employer's right to control the manner [***31] in which the work is to be performed;
>
> (2) the extent of the ***relative investments of the alleged employer and employee*** and whether the alleged employee employs helpers;
>
> (3) the alleged employee's opportunity for profit or loss depending upon his or her managerial skills;
>
> (4) whether the service rendered requires a special skill;
>
> (5) the degree of permanence of the working relationship; and
>
> (6) whether the service rendered is an integral part of the alleged employer's business.
>
> ***You may also consider other evidence bearing on this matter (including whether the alleged employer and alleged employees' believed or stated that they were creating an employment relationship or an independent contractor relationship) only to the extent that such statements or beliefs mirror economic reality. No one factor is controlling but*** [**45] ***you should weigh them all to determine whether or not the class members are so dependent upon defendant's business such that class members are not, as a matter of economic reality, in business for themselves. If you find that class members were, as a matter of economic reality, dependent upon defendant during the class period, you should find that class members were employees of*** [***32] ***defendant. On the other hand, if you find that class members, as a matter of*** [*61] ***economic reality, were not dependent upon defendant during the class period, you should find that class members were independent contractors.*** [90]

90 Clerk's Papers at 1819-20 (emphasis added).

¶59 As we just explained, relative investment of the parties is not among the six factors that a majority of the federal circuits use to determine the economic realities of the relationship between the parties. Moreover, even the Fifth Circuit, which includes this factor, states its six factor test differently from this proposed instruction. Thus, for both reasons, this proposed instruction does not correctly state the economic realities test followed by any of the federal circuits. We hold that the trial court did not abuse its discretion in refusing this proposed instruction, although we affirm the trial court on different grounds than the court utilized.

Judicial Estoppel

¶60 FedEx argues that judicial estoppel should preclude Anfinson from arguing that Instruction 9 is erroneous. The trial court implicitly rejected this argument below, and so do we.

[21, 22] ¶61 Judicial estoppel is an equitable doctrine that "'precludes a party from asserting [***33] one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.'" [91] Judicial estoppel requires the court to analyze three questions: (1) whether a party's current position is inconsistent with an earlier position, (2) whether judicial acceptance of an inconsistent position in the later proceeding will create the perception [*62] that the party misled either the first or second court, and (3) whether the party asserting the inconsistent position will obtain an unfair

advantage or impose an unfair detriment on the opposing party if not estopped. [92]

91 *Miller v. Campbell, 164 Wn.2d 529, 539, 192 P.3d 352 (2008)* (internal quotation marks omitted) (quoting *Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538, 160 P.3d 13 (2007)*).
92 *Id.*

[23] ¶62 We review the trial court's decision whether to apply judicial estoppel for an abuse of discretion. [93] A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. [94] A trial court's decision is manifestly unreasonable only if it is outside the range of acceptable choices, given the facts and the applicable legal standard. [95]

93 *Bartley-Williams v. Kendall, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006).*
94 *In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).*
95 *Id. at 47.*

[24, 25] ¶63 Anfinson **[***34]** moved to certify the class based on the theory that the common law "right to control" test articulated in *Ebling* was the correct legal standard for determining whether the class members were employees or independent contractors under the MWA. The court accepted this representation, stating in its findings and order on class certification that "[t]he critical test is whether FedEx had the 'right to control' the manner and means of the work performed."

¶64 Anfinson did not change its position as to the applicable test until pretrial motions a few months before the trial was set to commence. At that point, Anfinson proposed a series of alternative jury instructions, one of which was based on the "economic realities" test. FedEx responded to Anfinson's change in position by arguing that judicial estoppel precluded him from using the "economic realities" test because that argument is inconsistent with the legal standard that Anfinson proposed, and the trial court used, during the class certification phase of the **[*63]** litigation. FedEx, who did not cross-appeal, **[**46]** asserts the same argument in a footnote to its appellate brief. [96]

96 *Robinson v. Khan, 89 Wn. App. 418, 420, 948 P.2d 1347 (1998)* ("A notice **[***35]** of cross-review is essential if the respondent 'seeks affirmative relief as distinguished from the urging of additional grounds for affirmance.'" (quoting *Phillips Bldg. Co. v. An, 81 Wn. App. 696, 700 n.3, 915 P.2d 1146 (1996)*; *RAP 2.4(a)*)).

¶65 The trial court appears to have rejected FedEx's argument by dealing with the issue on the merits.

¶66 In a footnote, FedEx now argues that the doctrine of judicial estoppel should preclude Anfinson's arguments on appeal with respect to Instruction 9. FedEx claims these arguments are inconsistent with his legal position during the class certification proceedings that the common law "right to control" test was the applicable legal standard for determining whether the class members were independent contractors or employees.

¶67 But, the "heart of the doctrine [of judicial estoppel] is the prevention of inconsistent positions as to facts. It does not require counsel to be consistent on points of law." [97] Here, Anfinson's position on appeal is not factually inconsistent with his arguments in the class certification proceeding. Thus, the doctrine of judicial estoppel does not apply.

97 *King v. Clodfelter, 10 Wn. App. 514, 521, 518 P.2d 206 (1974).*

Anfinson's **[***36]** *Proposed Instructions 4 and 4A*

¶68 Anfinson also argues that the trial court abused its discretion by declining to give Anfinson's proposed instructions 4 and 4A.

¶69 Proposed instruction 4 states:

> Plaintiffs have signed operating agreements, or contracts, with defendant. These contracts state, among other things, that plaintiffs are "independent contractors." The contractual label of "independent contractor" does not determine whether plaintiffs are independent contractors or employees. You must determine whether plaintiffs are employees or independent contractors based on the actual relationship between plaintiffs **[*64]** and defendant. Stated otherwise, the subjective intent of the plaintiffs and defendant cannot override the facts of this actual relationship. [98]

Proposed instruction 4A is identical to proposed instruction 4 but omits the last sentence.

98 Clerk's Papers at 2169.

¶70 The trial court declined to give these instructions, in part, because it believed they overemphasized one of the factors the court believed controlled the case. We cannot say that the court abused its discretion in making this decision on that basis under those circum-

stances. In any event, because of our decision on Instruction [***37] 9, further discussion of these proposed instructions is likely moot. We do not envision that these instructions will likely be proposed on remand. If they are, we have given the trial court and the parties sufficient guidance.

Anfinson's Proposed Instruction 15A

¶71 Anfinson also argues that the trial court abused its discretion by declining to give Anfinson's proposed instruction 15A.

¶72 That instruction states:

> The fact that one or more of the plaintiffs, who provided services to defendant, did so through his or her personal business entity should not impact your decision in this case. If, applying the six factors set forth in Instruction No. ___, you find that the plaintiffs were so dependent upon defendant's business such that plaintiffs were not, as a matter of economic reality, in business for themselves during the class period, you must find that plaintiffs were employees of defendant. [99]

99 Clerk's Papers at 2174.

¶73 In view of our holding as to the proper test for distinguishing between employee and independent contractor, we need not address this claim. This instruction is unlikely to be proposed on remand.

[*65] [**47] *Instruction 8*

¶74 Anfinson argues that the trial court abused its discretion in giving the [***38] jury instruction 8. We hold that instruction was misleading and likely prejudicial. It also appears to be legally incorrect.

[26-30] ¶75 While the trial court has discretion with respect to the specific wording and number of jury instructions, the instructions must accurately state the law and may not mislead the jury. [100] Instruction 8 states:

> Plaintiffs have the burden of proving that "employee" status was ***common to the class members*** during the class period. You should not consider individualized actions, conduct, or work experiences unless you find that they reflect policies, procedures, or practices common to the class members during the class period. [101]

100 *Cox, 141 Wn.2d at 442.*

101 Clerk's Papers at 2194 (emphasis added).

¶76 We note that when the trial court took exceptions to its instructions to the jury, the court expressly rejected FedEx's proposal that this instruction should have stated "that employee status was ***common*** to ***all*** class members." The court stated in its ruling: "Specifically the court is persuaded that commonality does not require each and every class member be affected individually by the actions, conduct, or work experience if they have promulgated pursuant to a policy or widespread [***39] procedure or practice common to the class members during the class period." [102]

102 Report of Proceedings (Mar. 27, 2009) at 16.

¶77 Nevertheless, during closing argument, FedEx argued that "common" means "all" or every class member for purposes of this instruction. "[I]f [plaintiffs] showed you that only 319 [class members were employees] and one wasn't, your verdict should be for FedEx Ground because [*66] they haven't met their burden. They have to show you all." [103]

103 Report of Proceedings (Mar. 30, 2009) at 78.

¶78 Anfinson neither objected to this argument nor sought a curative instruction during closing. Rather, Anfinson argued that "common" means "frequent and widespread," not "all." [104]

104 Report of Proceedings (Mar. 30, 2009) at 56.

¶79 Under these circumstances, we conclude that the wording of the instruction was misleading and likely prejudicial to Anfinson. It was misleading because it permitted the jury to accept an argument that the court expressly ruled could not be made. "Common" does not mean "all," as FedEx argued during closing. Absent an objection and a request for a curative instruction, this instruction permitted the jury to decide that Anfinson failed to prove his case if any one member [***40] of the class failed to fulfill any of the relevant class criteria. There is no legal support for that proposition.

¶80 Based on the briefing on appeal and our independent research, we also conclude that the instruction appears to be legally incorrect. In so concluding, we note the complexity of this issue and the dearth of persuasive case law addressing the issue. On remand, the parties

should brief the question for the trial court to decide, with the following considerations in mind.

¶81 First, in addition to instruction 8, the trial court gave the standard burden of proof instruction based on WPI 2.101 as instruction 7. That instruction stated:

> When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question, that the proposition **[*67]** on which that party has the burden of proof is more probably true than not true. [105]

It appears that instruction 8 was intended to supplement this initial statement of the burden of proof. Whether this was proper under the circumstances of this **[***41]** case is unclear.

105 Clerk's Papers at 2193.

¶82 Second, as discussed above, the first sentence of instruction 8 is incorrect because *CR 23* does not require commonality as to ***evidence*** for the liability phase of a class **[**48]** action. [106] Commonality is a requirement at the certification phase of a class action proceeding. [107] Under *CR 23(a)(2)*, before certifying a class, the court must conclude that "there are questions of law or fact common to the class." In addition, the court must find that one of the alternatives under *CR 23(b)* is satisfied. Here, the court certified the class under *CR 23(b)(3)*, concluding that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." [108]

106 *See Rosario v. Livaditis, 963 F.2d 1013, 1017-18 (7th Cir. 1992)* ("The fact that there is some factual variation among the class grievances will not defeat a class action.").
107 *See CR 23.*
108 Clerk's Papers at 209-19.

¶83 A court should order class certification only after conducting a "'rigorous analysis'" to ensure that the plaintiff has satisfied *CR 23*'s prerequisites. [109] But contrary to FedEx's representation, *CR 23* does not require "that the shared **[***42]** questions of law or fact be identical" as to each individual class member. [110] Evidence from individual class members may be used to demonstrate a common course of conduct by the defendant employer. [111] If a defendant believes that the trial court certified the plaintiff class in error or that the requirements of *CR 23* are no longer **[*68]** satisfied, he may move for decertification at any point during the proceedings. [112] Here, FedEx moved for decertification and the court denied that motion. To the extent that FedEx relies on case law from the class certification stage of a *CR 23* action, that case law is not persuasive as to the plaintiff's burden of proof at the liability phase of trial. In short, commonality for certification purposes is separate from the burden of proof at the liability phase.

109 *Oda v. State, 111 Wn. App. 79, 93, 44 P.3d 8 (2002)* (quoting *Gen. Tel. Co. of Sw. v. Fakon, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)*).
110 *Miller v. Farmer Bros. Co., 115 Wn. App. 815, 820, 64 P.3d 49 (2003).*
111 *Id. at 825.*
112 *Oda, 111 Wn. App. at 91.*

¶84 Third, with respect to the second sentence in instruction 8, this too appears to be incorrect. While Anfinson bears the burden of demonstrating that FedEx incorrectly classified the class members as independent contractors, FedEx has **[***43]** failed to point to persuasive authority holding that the finder of fact is prohibited from considering individualized actions, conduct, or work experiences in making this determination. The jury must consider all of the evidence adduced at trial to determine whether the class members were "employees" as a matter of economic reality. [113] But, evidence need not be identical as to each individual class member. [114] Rather, FLSA case law indicates that once at trial, plaintiffs may rely on testimony and evidence of representative employees to prove that the defendant's practices or policies impacted similarly situated employees. [115]

113 *See, e.g., Real, 603 F.2d at 754.*
114 *Martin v. Selker Bros., 949 F.2d 1286, 1298 (3d Cir. 1991)* ("It is not necessary for every single affected employee to testify in order to prove violations or to recoup back wages. The testimony and evidence of representative employees may be sufficient to establish prima facie proof of a pattern and practice of FLSA violations.").
115 *See Reich v. Gateway Press, Inc., 13 F.3d 685, 701-02 (3d Cir. 1994)* ("[N]ot all employees need to testify in order to prove the violations or to recoup back wages. **[***44]** Rather, the Secretary can rely on testimony and evidence from representative employees to meet the initial burden of proof requirement. 'Once the pattern is established, the burden shifts to the employer to rebut the existence of violations [ ] or to prove that individual employees are excepted from the pattern or practice.'" (second alteration in original) (citations omitted) (quoting *Martin, 949 F.2d at*

1298)); *Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 686-88, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946)* (holding that the plaintiff's burden in a collective action for uncompensated work under FLSA is to produce sufficient evidence to show the amount and extent of the uncompensated work as a matter of "just and reasonable inference").

[*69] ¶85 Here, instruction 8 did not inform the jury that it ***could*** consider representative evidence only to the extent it demonstrated FedEx's policies or practices. Rather, it instructed the jury that it "should not consider individualized actions, conduct, or work experiences ***unless you find that they reflect*** [**49] ***policies, procedures, or practices common to the class members during the class period.***" [116] This is incorrect.

116 Clerk's Papers at 2194 (emphasis added).

¶86 FedEx relies on *In re FedEx Ground Package System, Inc.* [117] to support the proposition that [***45] representative evidence is not appropriate in the context of determining employment status. That case is distinguishable. There, the court granted FedEx's motion to strike evidence of individual class members' employment experiences. [118] But there, the test for determining employment status was the common law "right to control" test. [119] The court noted in its class certification order, "[T]he court recognized the common application of the Operating Agreement and FedEx policies and procedures in determining the merits of class action cases, but indicated it wouldn't consider any individualized evidence of the parties' relationship." [120]

117 Opinion and Order, *In re FedEx Ground Package Sys., Inc., Emp't Practices Litig., No. 3:05-CV-530 RM, 2010 WL 3239363 (N.D. Ind. Aug. 11, 2010).*
118 *Id. at *1, *20-21.*
119 *Id. at *27-28.*
120 *Id. at *20.*

¶87 Here, however, the test for determining whether FedEx delivery drivers are independent contractors or employees is not whether FedEx had the "right to control" the workers. Rather, the test in Washington for determining employment status is the "economic reality" of the working relationship. Under this test, it is likely that evidence of the actual working relationship between FedEx and FedEx [*70] drivers would be relevant and probative. For this reason, FedEx's [***46] reliance on *FedEx Ground Package System* is not persuasive.

¶88 Finally, FedEx argues that the cases Anfinson cites to support the propriety of representative evidence in the wage and hour law context are distinguishable. We agree that the cases Anfinson cites deal primarily with the issue of damages under the FLSA and are in that sense distinguishable from the issue in this case. [121] However, we conclude that they do not support the court's instruction 8.

121 *See, e.g., Anderson, 328 U.S. at 688* ("[H]ere we are assuming that the employee has proved that he has performed work and has not been paid in accordance with the statute. ... The uncertainty lies only in the amount of damages arising from the statutory violation by the employer.").

¶89 In *Anderson v. Mt. Clemens Pottery Co.*, [122] the Supreme Court concluded that due to the remedial nature and the great public policy of the FLSA, the burden of proof for an employee who brings suit for unpaid minimum wages or unpaid overtime compensation under the act should not be insurmountable. [123] The Court concluded that the appropriate burden of proof for a claim of uncompensated work under the FLSA is "sufficient evidence to show the amount and extent [***47] of that work as a matter of just and reasonable inference." [124]

122 *328 U.S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946).*
123 *Id. at 686-87.*
124 *Id. at 687.*

¶90 *Anderson* is distinguishable from this case in that the discussion of the burden of proof was related only to the measure of damages, not the fact of liability. [125] Here, on the other hand, the issue is liability itself, not the resulting damages. However, as discussed at length above, the test for determining liability is whether the class of plaintiffs was, as a matter of economic reality, dependent on FedEx. This determination requires analysis of the written practices and procedures of FedEx. But it also requires analysis of the [*71] actual working relationship of the parties, which may be presented only in the form of representative evidence from individual class members.

125 *Id. at 688.*

¶91 For these reasons instruction 8 appears to be legally incorrect. Because it was also misleading and prejudicial, it should not have been given.

Anfinson's Proposed Instructions 11A and 12A

¶92 Anfinson also argues that the trial court abused its discretion in refusing to give [**50] Anfinson's proposed instructions 11A and 12A. We disagree.

¶93 Anfinson's proposed instruction [***48] 11A and instruction 12A deal with the burden of proof and

the issue of representative evidence. As discussed at length above with respect to instruction 8, the case law on these issues is inconclusive. For that reason, we conclude that the trial court did not abuse its discretion in declining to give these instructions.

JURY VERDICT FORM

¶94 Anfinson argues that the trial court erred by giving its special verdict form and refusing to give the proposed verdict form [second alternative]. We disagree.

[31, 32] ¶95 Jury verdict forms, like jury instructions, are sufficient when they "allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied." [126] We review alleged errors of law in jury instructions and verdict forms de novo. [127]

126 *Farmboy, 127 Wn.2d at 92.*
127 *Id.*

[33] ¶96 Here, the court gave its form of jury verdict, which read as follows:

> We, the jury, find that during the class period, December 21, 2001 to December 31, 2005, the class members were (check one):
>
> **[*72]** [ ] Independent Contractors
>
> [ ] Employees [128]

The question here is whether the court or the jury should make the determination whether a claimant is an employee under **[***49]** the MWA or an independent contractor. We hold that this is a jury question.

128 Clerk's Papers at 2220.

¶97 Employment status is a mixed question of fact and law. [129] Mixed questions of fact and law may be submitted to a jury under proper instructions, "unless the facts are undisputed and the inferences to be drawn from them are plain and not open to doubt by reasonable persons." [130] Where the facts are disputed, the determination of employment status is properly a question for the trier of fact. [131]

129 *See Graves, 94 Wn.2d at 302-03*; *Brock, 840 F.2d at 1059.*
130 *Zurfluh v. Lewis County, 199 Wash. 378, 381, 91 P.2d 1002 (1939), overruled in part on other grounds by Portland-Seattle Auto Freight, Inc. v. Jones, 15 Wn.2d 603, 131 P.2d 736 (1942)* (holding question of proximate cause is a mixed question of law and fact which must be submitted to the jury unless the facts are undisputed); *Ling Nan Zheng v. Liberty Apparel Co., 617 F.3d 182, 185-86 (2d Cir. 2010)* (holding that in the context of a jury trial, whether a defendant is a plaintiffs' joint employer is a mixed question of law and fact and is properly a question for the jury); *Davila v. Yellow Cab Co., 333 Ill. App. 3d 592, 595, 776 N.E.2d 720, 267 Ill. Dec. 348 (2002)* **[***50]** (holding question of whether employer/employee relationship exists is a mixed question of law and fact to be submitted to a jury unless the facts are undisputed); *Johnson v. Unified Government of Wyandotte County, 180 F. Supp. 2d 1192, 1202-03 (D. Kan. 2001)* (concluding that special verdict form requiring jury to decide employee/independent contractor status was not error because questions of fact and questions of law were inextricably intertwined, and because verdict form was not prejudicial).
131 *Zurfluh, 199 Wash. at 381*; *Ling Nan Zheng, 617 F.3d at 185-86*; *Davila, 333 Ill. App. 3d at 595*; *Johnson, 180 F. Supp. 2d at 1202-03.*

¶98 Here, where the facts were highly contested, it was appropriate for the verdict form to ask the jury to determine whether the class members were "employees" or "independent contractors."

¶99 Based on *Tift v. Professional Nursing Services, Inc.*, [132] Anfinson argues that the jury should have been given a special verdict form for factual determinations **[*73]** about the factors contained in the employment status test. This would have left the final determination of employment status to the trial court. In *Tift*, this court concluded that "[t]he ultimate finding as to employee status is not simply a factual inference drawn from historical facts, but more accurately, is a legal conclusion based on factual **[***51]** inferences drawn from historical facts." [133]

132 *76 Wn. App. 577, 886 P.2d 1158 (1995).*
133 *Id. at 582.*

[51]** ¶100 While Anfinson's citation to *Tift* is accurate, we conclude that the trial court did not err in submitting the question of employment status to the jury.

ATTORNEY FEES

[34] ¶101 Anfinson seeks fees on appeal based on *RCW 49.46.090* and *RCW 49.48.030*. Because it is premature to determine whether such an award is proper at

this stage of this case, we deny the request without prejudice to a future application for such fees.

¶102 Former *RCW 49.46.090(1)* (1971) of the MWA provides in relevant part:

> Any employer who pays any employee less than wages to which such employee is entitled under or by virtue of this chapter, shall be liable to such employee affected for the full amount of such wage rate, less any amount actually paid to such employee by the employer, and for costs and such reasonable attorney's fees as may be allowed by the court.

¶103 Furthermore, *RCW 49.48.030* of the wage statute provides:

> In any action in which any person is successful in recovering judgment for wages or salary owed to him [or her], reasonable attorney's fees, in an amount to be determined by the court, shall be assessed against said employer or former [***52] employer: PROVIDED, HOWEVER, That this section shall not apply if the amount of recovery is less than or equal to the amount admitted by the employer to be owing for said wages or salary.

[*74] ¶104 Because we remand this case for further proceedings, there has been no judgment for wages under the MWA. Likewise, there has been no determination that FedEx has paid less than the wages that are due. Accordingly, a fee award on the basis of either statute is premature.

¶105 We affirm in part, reverse in part, and remand for further proceedings.

DWYER, C.J., and BECKER, J., concur.

Michael J. Killeen, Employment in Washington: A Guide to Employment Laws, Regulations and Practices (4th ed.)

Littler Mendelson, The Washington Employer, 2010-11 ed.

Washington Rules of Court Annotated (LexisNexis ed.)

Annotated Revised Code of Washington by LexisNexis

Order Denying Motion for Reconsideration

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RANDY ANFINSON; JAMES GEIGER; and STEVEN HARDIE, individually and on behalf of others similarly situated, Appellants, v. FEDEX GROUND PACKAGE SYSTEM, INC.; JOHN SCHNEBECK; CHERYL PILAKOWSKI; and JOHN DOES 1 through 10, Respondents.	No. 63518-2-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Respondent FedEx Ground Package System, Inc., has moved for reconsideration of the opinion filed in this case on December 20, 2010. The panel hearing the case has considered the answer from Appellants, Randy Anfinson, et al. The court having considered the motion and Appellant's answer, has determined that the motion for reconsideration should be denied. This court hereby

ORDERS that the motion for reconsideration is denied.

Dated this 23rd day of February 20011.

FOR THE PANEL:

Cox, J.

Judge

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2011 FEB 23 PM 2:05

Jury Verdict

FILED
KING COUNTY, WASHINGTON

MAR 31 2009

SUPERIOR COURT CLERK
THERESA GRAHAM
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

RANDY ANFINSON, JAMES GEIGER and STEVEN HARDIE, individually and on behalf of others similarly situated, Plaintiffs, v. FEDEX GROUND PACKAGE SYSTEM, INC., et al., Defendants.	No. 04-2-39981-5SEA JURY VERDICT

We, the jury, find that during the class period, December 21, 2001 to December 31, 2005, the class members were (check one):

[✓] Independent Contractors

[ ] Employees

DATE: MAR 31, 2009

Rob Parker

Presiding Juror

Court's Instructions to the Jury

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

ANFINSON, et al, Plaintiffs, vs. FEDEX GROUND PACKAGE SYSTEMS, INC., Defendant.	)	No. 04-2-39981-5 SEA

COURT'S INSTRUCTIONS TO THE JURY

March 30, 2009

/s/ John P. Erlick

John P. Erlick, Judge

John P. Erlick, Judge
King County Superior Court
516 Third Avenue
Seattle WA 98104
(206) 296-9345

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of the witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that

any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties

receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

INSTRUCTION NO. 2

The following is a summary of the claims of the parties. You are not to consider the summary as proof of the matters claimed unless admitted by the opposing party; and you are to consider only those matters that are admitted or are established by the evidence. These claims have been outlined solely to aid you in understanding the issues.

Plaintiffs claim that FedEx Ground improperly classified the class members as "independent contractors" for the period of time between December 21, 2001 and December 31, 2005. Plaintiffs claim that the class members were actually employees of FedEx Ground. Defendant FedEx Ground claims that the class member were properly classified as independent contractors and behaved in a manner consistent with that status.

INSTRUCTION NO. 3

This class is comprised of all persons (excluding opt-outs) who performed services as a pick up and delivery driver, or "contractor," for defendant during the class period (December 21, 2001 through December 31, 2005) who signed (or did so through a personal corporate entity) a FedEx operating agreement and who handled a single route at some point during the class period; excluding persons who only performed or filled one or more of the following positions during the class period: multiple route contractors, temporary drivers, line-haul drivers, or who worked for another contractor.

INSTRUCTION NO. 4

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 5

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

INSTRUCTION NO. 6

The law treats all parties equally whether they are corporations or individuals. This means that corporations and individuals are to be treated in the same fair and unprejudiced manner.

The defendant FedEx Ground Package System, Inc. is a corporation. A corporation can act only through its officers and employees. Any act or omission of an officer or employee is the act or omission of the corporation.

INSTRUCTION NO. 7

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true.

INSTRUCTION NO. 8

Plaintiffs have the burden of proving that "employee" status was common to the class members during the class period. You should not consider individualized actions, conduct, or work experience unless you find that they reflect policies, procedures, or practices common to the class members during the class period.

INSTRUCTION NO. 9

You must decide whether the class members were employees or independent contractors when performing work for FedEx Ground. This decision requires you to determine whether FedEx Ground controlled, or had the right to control, the details of the class members' performance of the work.

In deciding control or right to control, you should consider all the evidence bearing on the question, and you may consider the following factors, among others:

1. The degree of FedEx Ground's right to control the manner in which the work is to be performed;
2. The class members' opportunity for profit or loss depending upon each one's managerial skill;
3. The class members' investment in equipment or materials required for their tasks, or their employment of others;
4. Whether the service rendered requires a special skill;
5. The degree of permanence of the working relationship;
6. Whether the service rendered is an integral part of FedEx Ground's business;
7. The method of payment, whether by the time or by the job; and
8. Whether or not the class members and FedEx Ground believed they were creating an employment relationship or an independent contractor relationship.

Neither the presence nor the absence of any individual factor is determinative.

INSTRUCTION NO. 10

When you are taken to the jury room to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

You will be given the exhibits admitted in evidence, these instructions, and verdict form for recording your verdict. Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

If you decide the case in favor of plaintiffs, then you should check the "employees" box on the verdict form. If you decide the case for the defendant, then you should check the "independent contractors" box on the verdict form.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If you need to ask the court a question that you have been unable to answer among yourselves after reviewing the evidence and instructions, write the question simply and clearly. The presiding juror should sign and date the question and give it to the bailiff. The court will confer with counsel to determine what answer, if any, can be given.

In your question to the court, do not indicate how your deliberations are proceeding. Do not state how the jurors have voted on any particular question, issue, or claim, or in any other way express your opinions about the case.

In order to reach a verdict ten of you must agree. When ten of you have agreed, then the presiding juror will fill in the verdict form. The presiding juror must sign the verdict whether or not the presiding juror agrees with it. The presiding juror will then inform the bailiff that you have reached a verdict. The bailiff will conduct you back into this courtroom where the verdict will be announced.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

RANDY ANFINSON, JAMES GEIGER and STEVEN HARDIE, individually and on behalf of others similarly situated, Plaintiffs, v. FEDEX GROUND PACKAGE SYSTEM, INC., et al., Defendants.	No. 04-2-39981-5SEA **JURY VERDICT**

We, the jury, find that during the class period, December 21, 2001 to December 31, 2005, the class members were (check one):

[ ] Independent Contractors

[ ] Employees

DATE: _____

_____

Presiding Juror

RCW Excerpts

and required to be performed by, the industrial welfare commission."

1921 c 7 § 82 was codified by the 1941 Code Committee as RCW 43.22.280, wherein the Code Committee revised the wording of the session law to designate the unnamed committee as the "industrial welfare committee." The committee was apparently commonly known by that name, but such designation has no foundation in the statutes. RCW 43.22.280 was repealed by 1982 c 163 § 23. Powers, duties, and functions of the industrial welfare committee were transferred to the director of labor and industries. See RCW 43.22.282.

Cross References

Child labor, see §§ 26.28.060, 26.28.070.
Director of labor and industries, duties with respect to this ch., see § 43.22.270.
Food and beverage establishment workers' permits, see § 69.06.010 et seq.
Hours of labor, see § 49.28.010 et seq.
Minimum Wage Act, see § 49.46.005 et seq.
Minors entitled to benefits, emergency workers, see § 38.52.270.
Public works and contracts, Optional Municipal Code, see § 35A.40.200.

Administrative Code References

Labor standards. all occupations, applicability, see WAC 296–126–001 et seq.
Family care leave, see WAC 296–130–010 et seq.

Law Review and Journal Commentaries

Illegal alien as employee under NLRA. 16 Gonz.L.Rev. 201 (1980).

Implementing the equal rights amendment to State Constitution; employment. 49 Wash.L.Rev. 590 (1974).

Westlaw Electronic Research

See Westlaw Electronic Research Guide following the Preface.

49.12.005. Definitions

For the purposes of this chapter:

(1) "Department" means the department of labor and industries.

(2) "Director" means the director of the department of labor and industries, or the director's designated representative.

(3)(a) Before May 20, 2003, "employer" means any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees but does not include the state, any state institution, any state agency, political subdivision of the state, or any municipal corporation or quasi-municipal corporation. However, for the purposes of RCW 49.12.265 through 49.12.295, 49.12.350 through 49.12.370, 49.12.450, and 49.12.460 only, "employer" also includes the state, any state institution, any state agency, political

subdivisions of the state, and any municipal corporation or quasi-municipal corporation.

(b) On and after May 20, 2003, "employer" means any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees, and includes the state, any state institution, state agency, political subdivisions of the state, and any municipal corporation or quasi-municipal corporation. However, this chapter and the rules adopted thereunder apply to these public employers only to the extent that this chapter and the rules adopted thereunder do not conflict with: (i) Any state statute or rule; and (ii) respect to political subdivisions of the state and any municipal or quasi-municipal corporation, any local resolution, ordinance, or rule adopted under the authority of the local legislative authority before April 1, 2003.

(4) "Employee" means an employee who is employed in the business of the employee's employer whether by way of manual labor or otherwise.

(5) "Conditions of labor" means and includes the conditions of rest and meal periods for employees including provisions for personal privacy, practices, methods and means by or through which labor or services are performed by employees and includes bona fide physical qualifications in employment, but shall not include conditions of labor otherwise governed by statutes and rules and regulations relating to industrial safety and health administered by the department.

(6) For the purpose of chapter 16, Laws of 1973 2nd ex. sess. a minor is defined to be a person of either sex under the age of eighteen years.

[2003 c 401 § 2, eff. May 20, 2003; 1998 c 334 § 1; 1994 c 164 § 13; 1988 c 236 § 8; 1973 2nd ex.s. c 16 § 1.]

Historical and Statutory Notes

Findings—Purpose—Intent—Effective date—2003 c 401: See notes following RCW 49.12.187.

Construction—1998 c 334: See note following RCW 49.12.450.

Legislative findings—Effective date—Implementation—Severability—1988 c 236: See notes following RCW 49.12.270.

Laws 1988, ch. 236, § 8, in the definition of "employer" added "and for the purposes of RCW 49.12.270 through 49.12.295 also includes the state, any state institution, any state agency, political subdivisions of the state, and any municipal corporation or quasi-municipal corporation".

Laws 1994, ch. 164, § 13, made the section gender neutral and deleted sub-

sec. (7) which defined "committee" to mean the industrial welfare committee.

Laws 1998, ch. 334, § 1, in the definition of "employer" following "through 49.12.295" inserted "and 49.12.450".

Laws 2003, ch. 401, § 2 rewrote the section, which formerly read:

"For the purposes of this chapter:

"(1) The term 'department' means the department of labor and industries.

"(2) The term 'director' means the director of the department of labor and industries, or the director's designated representative.

"(3) The term 'employer' means any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees and for the purposes of RCW 49.12.270 through 49.12.295 and 49.12.450 also includes the state, any state institution, any state agency, political subdivisions of the state, and any municipal corporation or quasi-municipal corporation.

"(4) The term 'employee' means an employee who is employed in the business of the employee's employer whether by way of manual labor or otherwise.

"(5) The term 'conditions of labor' shall mean and include the conditions of rest and meal periods for employees including provisions for personal privacy, practices, methods and means by or through which labor or services are performed by employees and includes bona fide physical qualifications in employment, but shall not include conditions of labor otherwise governed by statutes and rules and regulations relating to industrial safety and health administered by the department.

"(6) For the purpose of chapter 16, Laws of 1973 2nd ex. sess. a minor is defined to be a person of either sex under the age of eighteen years."

Laws 2003, ch. 401, § 1 provides:

"The legislature finds that the enactment of chapter 236, Laws of 1988 amended the definition of employer under the industrial welfare act, chapter 49.12 RCW, to ensure that the family care provisions of that act applied to the state and political subdivisions. The legislature further finds that this amendment of the definition of employer may be interpreted as creating an ambiguity as to whether the other provisions of chapter 49.12 RCW have applied to the state and its political subdivisions. The purpose of this act is to make retroactive, remedial, curative, and technical amendments to clarify the intent of chapter 49.12 RCW and chapter 236, Laws of 1988 and resolve any ambiguity. It is the intent of the legislature to establish that, prior to the effective date of this act, chapter 49.12 RCW and the rules adopted thereunder did not apply to the state or its agencies and political subdivisions except as expressly provided for in RCW 49.12.265 through 49.12.295, 49.12.350 through 49.12.370, 49.12.450, and 49.12.460."

Laws 2003, ch. 401, § 6 provides:

"This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 20, 2003]."

Research References

Treatises and Practice Aids

Employment Coordinator Benefits § 11:35, Washington.

Employment Coordinator Employment Practices § 20:76, Washington.

Employment Coordinator Employment Practices § 20:141, Washington.

Emp. Discrim. Coord. Analysis of State Law § 53:28, Private Employers.

Emp. Discrim. Coord. Analysis of State Law § 53:29, Public Employers.

under RCW 49.12.121 or 49.12.123, result in the death or permanent disability of a minor employee is guilty of a class C felony punishable according to chapter 9A.20 RCW.
[2003 c 53 § 273, eff. July 1, 2004; 1991 c 303 § 5.]

Historical and Statutory Notes

Intent—Effective date—2003 c 53: See notes following RCW 2.48.180.

Laws 2003, ch. 53 reorganized criminal provisions in order to clarify and simplify the identification and referencing of crimes.

Laws 2003, ch. 53, § 1 provides:

"The legislature intends by this act to reorganize criminal provisions throughout the Revised Code of Washington to clarify and simplify the identification and referencing of crimes. It is not intended that this act effectuate any substantive change to any criminal provision in the Revised Code of Washington."

Library References

Infants ⇐14.
Westlaw Topic No. 211.
C.J.S. Infants §§ 122 to 124.

Research References

Treatises and Practice Aids
Employment Coordinator Compensation § 28:70, Washington.

49.12.420. Child labor laws—Exclusive remedies

The penalties established in RCW 49.12.390 and 49.12.410 for violations of RCW 49.12.121 and 49.12.123 are exclusive remedies.
[1991 c 303 § 7.]

Library References

Infants ⇐14.
Westlaw Topic No. 211.
C.J.S. Infants §§ 122 to 124.

Research References

Treatises and Practice Aids
Employment Coordinator Compensation § 28:70, Washington.

49.12.450. Compensation for required employee work apparel—Exceptions—Changes—Rules—Expiration of subsection

(1) Notwithstanding the provisions of chapter 49.46 RCW or other provisions of this chapter, the obligation of an employer to furnish or compensate an employee for apparel required during work hours shall be determined only under this section.

(2) Employers are not required to furnish or compensate employees for apparel that an employer requires an employee to wear during working hours unless the required apparel is a uniform.

(3) As used in this section, "uniform" means:

(a) Apparel of a distinctive style and quality that, when worn outside of the workplace, clearly identifies the person as an employee of a specific employer;

(b) Apparel that is specially marked with an employer's logo;

(c) Unique apparel representing an historical time period or an ethnic tradition; or

(d) Formal apparel.

(4) Except as provided in subsection (5) of this section, if an employer requires an employee to wear apparel of a common color that conforms to a general dress code or style, the employer is not required to furnish or compensate an employee for that apparel. For the purposes of this subsection, "common color" is limited to the following colors or light or dark variations of such colors: White, tan, or blue, for tops; and tan, black, blue, or gray, for bottoms. An employer is permitted to require an employee to obtain two sets of wearing apparel to accommodate for the seasonal changes in weather which necessitate a change in wearing apparel.

(5) If an employer changes the color or colors of apparel required to be worn by any of his or her employees during a two-year period of time, the employer shall furnish or compensate the employees for the apparel. The employer shall be required to furnish or compensate only those employees who are affected by the change. The two-year time period begins on the date the change in wearing apparel goes into effect and ends two years from this date. The beginning and end of the two-year time period applies to all employees regardless of when the employee is hired.

(6) The department shall utilize negotiated rule making as defined by RCW 34.05.310(2)(a) in the development and adoption of rules defining apparel that conforms to a general dress code or style. This subsection expires January 1, 2000.

(7) For the purposes of this section, personal protective equipment required for employee protection under chapter 49.17 RCW is not deemed to be employee wearing apparel.

[1998 c 334 § 2.]

Historical and Statutory Notes

Construction—1998 c 334: "Nothing in this act shall be construed to alter the terms, conditions, or practices contained in any collective bargaining agreement in effect at the time of June 11, 1998, until the expiration date of such agreement." [1998 c 334 § 3.]

Library References

Labor and Employment ⇐200.
Westlaw Topic No. 231H.

49.12.460. Volunteer firefighters, reserve officers—Employer duties—Violations

(1) An employer may not discharge from employment or discipline a volunteer firefighter or reserve officer because of leave taken related to an alarm of fire or an emergency call.

(2)(a) A volunteer firefighter or reserve officer who believes he or she was discharged or disciplined in violation of this section may file a complaint alleging the violation with the director. The volunteer firefighter or reserve officer may allege a violation only by filing such a complaint within ninety days of the alleged violation.

(b) Upon receipt of the complaint, the director must cause an investigation to be made as the director deems appropriate and must determine whether this section has been violated. Notice of the director's determination must be sent to the complainant and the employer within ninety days of receipt of the complaint.

(c) If the director determines that this section was violated and the employer fails to reinstate the employee or withdraw the disciplinary action taken against the employee, whichever is applicable, within thirty days of receipt of notice of the director's determination, the volunteer firefighter or reserve officer may bring an action against the employer alleging a violation of this section and seeking reinstatement or withdrawal of the disciplinary action.

(d) In any action brought under this section, the superior court shall have jurisdiction, for cause shown, to restrain violations under this section and to order reinstatement of the employee or withdrawal of the disciplinary action.

(3) For the purposes of this section:

(a) "Alarm of fire or emergency call" means responding to, working at, or returning from a fire alarm or an emergency call, but not participating in training or other nonemergency activities.

The Minimum Wage Act (MWA) and FLSA are not identical, and the state's Supreme Court is not bound by federal authority under the FLSA, though such authority often provides helpful guidance. Drinkwitz v. Alliant Techsystems, Inc. (2000) 140 Wash.2d 291, 996 P.2d 582. Courts ⇐ 97(5)

4. Preemption

Regulation of wages and hours worked in the federal Service Contract Act (SCA) did not preempt the overtime wage provisions of Washington's Minimum Wage Act (MWA), with regard to truck drivers who worked over 40 hours a week within Washington's boundaries for private employers who contracted to transport mail for the United States Postal Service; SCA's protection for employees to receive a minimum wage was served when the employees received protections of both state and federal laws, and the language of the contract at issue could be fairly read to mean that the wages were a floor upon which state laws could build. Department of Labor and Industries v. Lanier Brugh (2006) 135 Wash.App. 808, 147 P.3d 588, publication ordered, reconsideration denied, review denied 161 Wash.2d 1025, 169 P.3d 831. Labor And Employment ⇐ 2222; States ⇐ 18.46

Labor Management Relations Act of 1947 (LMRA) generally does not preempt the Minimum Wage Act (MWA). Hisle v. Todd Pacific Shipyards Corp. (2004) 151 Wash.2d 853, 93 P.3d 108, reconsideration denied. Labor And Employment ⇐ 2177; States ⇐ 18.46

5. Public policy

The comprehensive scheme of wage and hour statutes shows the Legislature's strong policy in favor of payment of wages due employees. Almquist v. City of Redmond (2007) 140 Wash.App. 402, 166 P.3d 765. Labor And Employment ⇐ 2172

6. Nonprofit associations

Application of Minimum Wage and Hour Act to persons employed by nonprofit agriculture fair association. Op. Atty.Gen.1961–62, No. 106.

7. Criminal activities

Minimum Wage Act does not apply to "employments" or services rendered in violation of criminal statutes of this state. Cooper v. Baer (1962) 59 Wash.2d 763, 370 P.2d 871.

49.46.010. Definitions

As used in this chapter:

(1) "Director" means the director of labor and industries;

(2) "Wage" means compensation due to an employee by reason of employment, payable in legal tender of the United States or checks on banks convertible into cash on demand at full face value, subject to such deductions, charges, or allowances as may be permitted by rules of the director;

(3) "Employ" includes to permit to work;

(4) "Employer" includes any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee;

(5) "Employee" includes any individual employed by an employer but shall not include:

(a) Any individual (i) employed as a hand harvest laborer and paid on a piece rate basis in an operation which has been, and is generally and customarily recognized as having been, paid on a piece rate basis in the region of employment; (ii) who commutes daily from his or her permanent residence to the farm on which he or she is employed; and (iii) who has been employed in agriculture less than thirteen weeks during the preceding calendar year;

(b) Any individual employed in casual labor in or about a private home, unless performed in the course of the employer's trade, business, or profession;

(c) Any individual employed in a bona fide executive, administrative, or professional capacity or in the capacity of outside salesman as those terms are defined and delimited by rules of the director. However, those terms shall be defined and delimited by the director of personnel pursuant to chapter 41.06 RCW for employees employed under the director of personnel's jurisdiction;

(d) Any individual engaged in the activities of an educational, charitable, religious, state or local governmental body or agency, or nonprofit organization where the employer-employee relationship does not in fact exist or where the services are rendered to such organizations gratuitously. If the individual receives reimbursement in lieu of compensation for normally incurred out-of-pocket expenses or receives a nominal amount of compensation per unit of voluntary service rendered, an employer-employee relationship is deemed not to exist for the purpose of this section or for purposes of membership or qualification in any state, local government or publicly supported retirement system other than that provided under chapter 41.24 RCW;

(e) Any individual employed full time by any state or local governmental body or agency who provides voluntary services but only with regard to the provision of the voluntary services. The voluntary services and any compensation therefor shall not affect or add to qualification, entitlement or benefit rights under any state, local government, or publicly supported retirement system other than that provided under chapter 41.24 RCW;

(f) Any newspaper vendor or carrier;

(g) Any carrier subject to regulation by Part 1 of the Interstate Commerce Act;

(h) Any individual engaged in forest protection and fire prevention activities;

(i) Any individual employed by any charitable institution charged with child care responsibilities engaged primarily in the development of character or citizenship or promoting health or physical fitness or providing or sponsoring recreational opportunities or facilities for young people or members of the armed forces of the United States;

(j) Any individual whose duties require that he or she reside or sleep at the place of his or her employment or who otherwise spends a substantial portion of his or her work time subject to call, and not engaged in the performance of active duties;

(k) Any resident, inmate, or patient of a state, county, or municipal correctional, detention, treatment or rehabilitative institution;

(*l*) Any individual who holds a public elective or appointive office of the state, any county, city, town, municipal corporation or quasi municipal corporation, political subdivision, or any instrumentality thereof, or any employee of the state legislature;

(m) All vessel operating crews of the Washington state ferries operated by the department of transportation;

(n) Any individual employed as a seaman on a vessel other than an American vessel;

(6) "Occupation" means any occupation, service, trade, business, industry, or branch or group of industries or employment or class of employment in which employees are gainfully employed;

(7) "Retail or service establishment" means an establishment seventy-five percent of whose annual dollar volume of sales of goods or services, or both, is not for resale and is recognized as retail sales or services in the particular industry.

[2002 c 354 § 231; 1997 c 203 § 3; 1993 c 281 § 56; 1989 c 1 § 1 (Initiative Measure No. 518, approved November 8, 1988); 1984 c 7 § 364; 1977 ex.s. c 69 § 1; 1975 1st ex.s. c 289 § 1; 1974 ex.s. c 107 § 1; 1961 ex.s. c 18 § 2; 1959 c 294 § 1.]

Historical and Statutory Notes

Short title—Headings, captions not law—Severability—Effective dates—2002 c 354: See RCW 41.80.907 through 41.80.910.

Construction—1997 c 203: See note following RCW 49.46.130.

Effective date—1993 c 281: See note following RCW 41.06.022.

Effective date—1989 c 1 (Initiative Measure No. 518, approved November 8, 1988): "This act shall take effect January 1, 1989." [1989 c 1 § 5.]

Severability—1984 c 7: See note following RCW 47.01.141.

Following the 1961 amendment, this section read:

"As used in this chapter:

"(1) 'Director' means the director of labor and industries;

"(2) 'Wage' means compensation due to an employee by reason of his employment, payable in legal tender of the United States or checks on banks convertible into cash on demand at full face value, subject to such deductions, charges, or allowances as may be permitted by regulations of the director under RCW 49.46.050.

"(3) 'Employ' includes to suffer or to permit to work;

"(4) 'Employer' includes any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee;

"(5) 'Employee' includes any individual employed by an employer but shall not include:

"(a) any individual employed (i) on a farm, in the employ of any person, in connection with the cultivation of the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wild life, or in the employ of the owner or tenant or other operator of a farm in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment; or (ii) in packing, packaging, grading, storing or delivering to storage, or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; and the exclusions from the term 'employee' provided in this item shall not be deemed applicable with respect to commercial canning, commercial freezing, or any other commercial processing, or with respect to services performed in connection with the cultivation, raising, harvesting and processing of oysters or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption;

"(b) any individual employed in domestic service in or about a private home;

"(c) any individual employed in a bona fide executive, administrative, or professional capacity or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the director);

"(d) any individual employed by the United States;

"(e) any individual engaged in the activities of an educational, charitable, religious, or nonprofit organization where the employer-employee relationship does not in fact exist or where the services are rendered to such organizations gratuitously;

"(f) any newspaper vender or carrier;

"(g) any carrier subject to regulation by Part I of the Interstate Commerce Act;

"(h) any individual engaged in forest protection and fire prevention activities;

"(i) any individual employed by the state, any county, city or town, municipal corporation or quasi-municipal corporation, political subdivision, or any instrumentality thereof;

"(j) any individual employed by any charitable institution charged with child care responsibilities engaged primarily in the development of character or citizenship or promoting health or physical fitness or providing or sponsoring recreational opportunities or facilities for young people or members of the armed forces of the United States;

"(k) any individual engaged in performing services in a hospital licensed pursuant to chapter 70.41 or chapter 71.12;

"(l) any individual engaged in performing services in a nursing home licensed pursuant to chapter 18.51;

"(m) any individual whose duties require that he reside or sleep at the place of his employment or who otherwise spends a substantial portion of his work time subject to call, and not engaged in the performance of active duties.

"(6) 'Occupation' means any occupation, service, trade, business, industry, or branch or group of industries or employment or class of employment in

which employees are gainfully employed."

Laws 1974, Ex.Sess., ch. 107, § 1, in the definition of "employee" deleted former subds. (k) and (*l*); and redesignated former subd. (m) as (k) [now subd. (j)].

Laws 1975, Ex.Sess., ch. 289, § 1, rewrote the definition of "employee" to read:

"(5) 'Employee' includes any individual employed by an employer but shall not include:

"(a) Any individual employed (i) on a farm, in the employ of any person, in connection with the cultivation of the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and furbearing animals and wildlife, or in the employ of the owner or tenant or other operator of a farm in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment; or (ii) in packing, packaging, grading, storing or delivering to storage, or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; and the exclusions from the term "employee" provided in this item shall not be deemed applicable with respect to commercial canning, commercial freezing, or any other commercial processing, or with respect to services performed in connection with the cultivation, raising, harvesting, and processing of oysters or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption;

"(b) Any individual employed in domestic service in or about a private home;

"(c) Any individual employed in a bona fide executive, administrative, or professional capacity or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the director: *Provided However*, That such terms shall be defined and delimited by the state personnel board pursuant to chapter 41.06 RCW and the higher education personnel board pursuant to chapter 28B.16 RCW for employees employed under their respective jurisdictions);

"(d) Any individual engaged in the activities of an educational, charitable, religious, governmental agency or nonprofit organization where the employer-employee relationship does not in fact exist or where the services are rendered to such organizations gratuitously;

"(e) Any newspaper vendor or carrier;

"(f) Any carrier subject to regulation by Part 1 of the Interstate Commerce Act;

"(g) Any individual engaged in forest protection and fire prevention activities;

"(h) Any individual employed by any charitable institution charged with child care responsibilities engaged primarily in the development of character or citizenship or promoting health or physical fitness or providing or sponsoring recreational opportunities or facilities for young people or members of the armed forces of the United States;

"(i) Any individual whose duties require that he reside or sleep at the place of his employment or who otherwise spends a substantial portion of his work time subject to call, and not engaged in the performance of active duties;

"(j) Any resident, inmate, or patient of a state, county, or municipal correctional, detention, treatment or rehabilitative institution.

"(k) Any individual who holds a public elective or appointive office of the state, any county, city, town, municipal corporation or quasi municipal corporation, political subdivision, or any instrumentality thereof, or any employee of the state legislature.

"(*l*) All vessel operating crews of the Washington state ferries operated by the state highway commission.

"(m) Any individual employed as a seaman on a vessel other than an American vessel."

Laws 1977, Ex.Sess., ch. 69, § 1, in the definition of "employee", in subd.

(d), inserted "state or local"; inserted "body or"; added the proviso; inserted subd. (e); and redesignated the remaining subdivisions accordingly.

Laws 1984, ch. 7, § 364, in the definition of "wage" preceding "employment" deleted "his"; following "director" deleted "under RCW 49.46.050"; in the definition of "employ" following "includes" deleted "to suffer or"; made nonsubstantive changes throughout the definition of "employee"; and, in the definition of "employee", in subd. (m), substituted "department of transportation" for "state highway commission". Following amendment, the definition of "employee" read:

"(5) 'Employee' includes any individual employed by an employer but shall not include:

"(a) Any individual employed (i) on a farm, in the employ of any person, in connection with the cultivation of the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and furbearing animals and wildlife, or in the employ of the owner or tenant or other operator of a farm in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment; or (ii) in packing, packaging, grading, storing or delivering to storage, or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; and the exclusions from the term 'employee' provided in this item shall not be deemed applicable with respect to commercial canning, commercial freezing, or any other commercial processing, or with respect to services performed in connection with the cultivation, raising, harvesting, and processing of oysters or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption;

"(b) Any individual employed in domestic service in or about a private home;

"(c) Any individual employed in a bona fide executive, administrative, or professional capacity or in the capacity of outside salesman as those terms are defined and delimited by regulations of the director. However, those terms shall be defined and delimited by the state personnel board pursuant to chapter 41.06 RCW and the higher education personnel board pursuant to chapter 28B.16 RCW for employees employed under their respective jurisdictions;

"(d) Any individual engaged in the activities of an educational, charitable, religious, state or local governmental body or agency, or nonprofit organization where the employer-employee relationship does not in fact exist or where the services are rendered to such organizations gratuitously. If the individual receives reimbursement in lieu of compensation for normally incurred out-of-pocket expenses or receives a nominal amount of compensation per unit of voluntary service rendered, an employer-employee relationship is deemed not to exist for the purpose of this section or for purposes of membership or qualification in any state, local government or publicly supported retirement system other than that provided under chapter 41.24 RCW;

"(e) Any individual employed full time by any state or local governmental body or agency who provides voluntary services but only with regard to the provision of the voluntary services. The voluntary services and any compensation therefor shall not affect or add to qualification, entitlement or benefit rights under any state, local government, or publicly supported retirement system other than that provided under chapter 41.24 RCW;

"(f) Any newspaper vendor or carrier;

"(g) Any carrier subject to regulation by Part 1 of the Interstate Commerce Act;

"(h) Any individual engaged in forest protection and fire prevention activities;

"(i) Any individual employed by any charitable institution charged with child care responsibilities engaged primarily

in the development of character or citizenship or promoting health or physical fitness or providing or sponsoring recreational opportunities or facilities for young people or members of the armed forces of the United States;

"(j) Any individual whose duties require that he reside or sleep at the place of his employment or who otherwise spends a substantial portion of his work time subject to call, and not engaged in the performance of active duties;

"(k) Any resident, inmate, or patient of a state, county, or municipal correctional, detention, treatment or rehabilitative institution;

"(l) Any individual who holds a public elective or appointive office of the state, any county, city, town, municipal corporation or quasi municipal corporation, political subdivision, or any instrumentality thereof, or any employee of the state legislature;

"(m) All vessel operating crews of the Washington state ferries operated by the department of transportation;

"(n) Any individual employed as a seaman on a vessel other than an American vessel."

Laws 1989, ch. 1, § 1, in the definition of "employee" rewrote subds. (a) and (b) to read as they now appear; and, in subd. (j), neutralized gender.

Laws 1993, ch. 281, § 56, in subsec. (2), near the end, substituted "rules" for "regulations"; in subsec. (5)(c), in the first sentence, substituted "rules" for "regulations"; and rewrote the second sentence, which previously read: "However, those terms shall be defined and delimited by the state personnel board pursuant to chapter 41.06 RCW and the higher education personnel board pursuant to chapter 28B.16 RCW for employees employed under their respective jurisdictions".

Laws 1997, ch. 203, § 3 added the definition of "Retain or service establishment".

Laws 2002, ch. 354, § 231 rewrote subsec. (5)(c), which formerly read:

"(c) Any individual employed in a bona fide executive, administrative, or professional capacity or in the capacity of outside salesman as those terms are defined and delimited by rules of the director. However, those terms shall be defined and delimited by the Washington personnel resources board pursuant to chapter 41.06 RCW;"

Research References

ALR Library

123 ALR, Federal 485, When is Employee Paid on "Salaried Basis" in Order to Qualify as Bona Fide Executive, Administrative, or Professional Employee Under Labor Regulations (29 CFR §§ 541.1-541.3) Exempting Such Persons from Minimum Wage...

124 ALR, Federal 1, Who is Employed in "Administrative Capacity" Within Exemption, Under 29 U.S.C.A. § 213(A)(1), from Minimum Wage and Maximum Hours Provisions of Fair Labor Standards Act (29 U.S.C.A. §§ 201-219)...

169 ALR 315, Comment Note.--Duty in Instructing Jury in Criminal Prosecution to Explain and Define Offense Charged.

169 ALR 1307, Provision of Fair Labor Standards Act for Increased Compensation for Overtime.

Treatises and Practice Aids

Employment Coordinator Compensation § 10:5, Minimum Wage Exemption Under State Law.

Employment Coordinator Compensation § 13:4, Government Employees.

Employment Coordinator Compensation § 13:5, Police and Firefighters.

Employment Coordinator Compensation § 13:6, Volunteers for Nonprofit Groups.

Employment Coordinator Compensation § 13:7, Employees of Nonprofit Groups.

Employment Coordinator Compensation § 5:21, Small Farm Employee Exemptions Under Similar State Laws.

Employment Coordinator Compensation § 6:49, Combined Minimum Wage and Overtime Pay Exemption Under State Law.

Historical and Statutory Notes

Laws 1961, Ex.Sess., ch. 18, § 4, deleted "hours" after "wages" in the first sentence; and a former proviso which read: "*Provided*, That as to any employer and employment which is subject to the federal fair labor standards act, compliance with such act shall be deemed likewise to constitute compliance with RCW 49.46.010(5)(c), 49.46.030, 49.46.050 and 49.46.070."

Library References

Labor and Employment ⇐2170.
Westlaw Topic No. 231H.

Research References

Treatises and Practice Aids

1B Wash. Prac. Series § 61.15, Wages--Minimum Wage.

Notes of Decisions

1. Validity

Equal protection clause of Constitution was violated by former provision of this section exempting employees covered by Federal Fair Labor Standards Act from operation of statutory provisions that employers were required to pay employees overtime compensation after eight hours' work in one day, notwithstanding that not more than forty hours were worked in any one week. Peterson v. Hagan (1960) 56 Wash.2d 48, 351 P.2d 127.

2. Federal law

Employer that is hotel or restaurant subject to both this act and Federal Fair Labor Standards Act is required to pay its eligible employees this act's minimum hourly wage, though lesser wage could be paid under the federal act because of credits for tips, board and lodging allowed under that act. Op. Atty.Gen.1974, No. 18.

49.46.130. Minimum rate of compensation for employment in excess of forty hour work week—Exceptions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees for a work week longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) This section does not apply to:

(a) Any person exempted pursuant to RCW 49.46.010(5). The payment of compensation or provision of compensatory time off in addition to a salary shall not be a factor in determining whether a person is exempted under RCW 49.46.010(5)(c);

(b) Employees who request compensating time off in lieu of overtime pay;

(c) Any individual employed as a seaman whether or not the seaman is employed on a vessel other than an American vessel;

(d) Seasonal employees who are employed at concessions and recreational establishments at agricultural fairs, including those seasonal employees employed by agricultural fairs, within the state provided that the period of employment for any seasonal employee at any or all agricultural fairs does not exceed fourteen working days a year;

(e) Any individual employed as a motion picture projectionist if that employee is covered by a contract or collective bargaining agreement which regulates hours of work and overtime pay;

(f) An individual employed as a truck or bus driver who is subject to the provisions of the Federal Motor Carrier Act (49 U.S.C. Sec. 3101 et seq. and 49 U.S.C. Sec. 10101 et seq.), if the compensation system under which the truck or bus driver is paid includes overtime pay, reasonably equivalent to that required by this subsection, for working longer than forty hours per week;

(g) Any individual employed (i) on a farm, in the employ of any person, in connection with the cultivation of the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife, or in the employ of the owner or tenant or other operator of a farm in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment; or (ii) in packing, packaging, grading, storing or delivering to storage, or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; or (iii) commercial canning, commercial freezing, or any other commercial processing, or with respect to services performed in connection with the cultivation, raising, harvesting, and processing of oysters or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption;

(h) Any industry in which federal law provides for an overtime payment based on a work week other than forty hours. However, the provisions of the federal law regarding overtime payment based on a work week other than forty hours shall nevertheless apply to employees covered by this section without regard to the existence of actual federal jurisdiction over the industrial activity of the particular employer within this state. For the purposes of this subsection, "industry" means a trade, business, industry, or

other activity, or branch, or group thereof, in which individuals are gainfully employed (section 3(h) of the Fair Labor Standards Act of 1938, as amended (Public Law 93–259));

(i) Any hours worked by an employee of a carrier by air subject to the provisions of subchapter II of the Railway Labor Act (45 U.S.C. Sec. 181 et seq.), when such hours are voluntarily worked by the employee pursuant to a shift-trading practice under which the employee has the opportunity in the same or in other work weeks to reduce hours worked by voluntarily offering a shift for trade or reassignment.

(3) No employer shall be deemed to have violated subsection (1) of this section by employing any employee of a retail or service establishment for a work week in excess of the applicable work week specified in subsection (1) of this section if:

(a) The regular rate of pay of the employee is in excess of one and one-half times the minimum hourly rate required under RCW 49.46.020; and

(b) More than half of the employee's compensation for a representative period, of not less than one month, represents commissions on goods or services.

In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate is to be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

(4) No employer of commissioned salespeople primarily engaged in the business of selling automobiles, trucks, recreational vessels, recreational vessel trailers, recreational vehicle trailers, recreational campers, manufactured housing, or farm implements to ultimate purchasers shall violate subsection (1) of this section with respect to such commissioned salespeople if the commissioned salespeople are paid the greater of:

(a) Compensation at the hourly rate, which may not be less than the rate required under RCW 49.46.020, for each hour worked up to forty hours per week, and compensation of one and one-half times that hourly rate for all hours worked over forty hours in one week; or

(b) A straight commission, a salary plus commission, or a salary plus bonus applied to gross salary.

(5) No public agency shall be deemed to have violated subsection (1) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if: (a) In a work period of twenty-eight consecutive days the employee receives for tours of duty which in the aggregate exceed two hundred forty hours; or (b) in the case of such an employee to whom a work period of at least seven but less than twenty-eight days applies, in his or her work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his or her work period as two hundred forty hours bears to twenty-eight days; compensation at a rate not less than one and one-half times the regular rate at which he or she is employed. [1998 c 239 § 2. Prior: 1997 c 311 § 1; 1997 c 203 § 2; 1995 c 5 § 1; 1993 c 191 § 1; 1992 c 94 § 1; 1989 c 104 § 1; prior: 1977 ex.s. c 4 § 1; 1977 ex.s. c 74 § 1; 1975 1st ex.s. c 289 § 3.]

Historical and Statutory Notes

Findings—Intent—1998 c 239: "The legislature finds that employees in the airline industry have a long-standing practice and tradition of trading shifts voluntarily among themselves. The legislature also finds that federal law exempts airline employees from the provisions of federal overtime regulations. This act is intended to specify that airline industry employers are not required to pay overtime compensation to an employee agreeing to work additional hours for a coemployee." [1998 c 239 § 1.]

Intent—Collective bargaining agreements—1998 c 239: "This act does not alter the terms, conditions, or practices contained in any collective bargaining agreement." [1998 c 239 § 3.]

Retroactive application—1998 c 239: "This act is remedial in nature and applies retroactively." [1998 c 239 § 4.]

Severability—1998 c 239: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1998 c 239 § 5.]

Construction—1997 c 203: "Nothing in this act shall be construed to alter the terms, conditions, or practices contained in any collective bargaining agreement in effect at the time of the effective date of this act [July 27, 1997] until the expiration date of such agreement." [1997 c 203 § 4.]

Intent—Application—1995 c 5: "This act is intended to clarify the original intent of RCW 49.46.010(5)(c). This act applies to all administrative and judicial actions commenced on or after February 1, 1995, and pending on March 30, 1995, and such actions commenced on or after March 30, 1995." [1995 c 5 § 2.]

Effective date—1995 c 5: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately [March 30, 1995]." [1995 c 5 § 3.]

Laws 1977, Ex.Sess., ch. 4, § 1, in subsec. (1), added "nor to seasonal employees who are employed at concessions and recreational establishments at agricultural fairs, including those seasonal employees employed by agricultural fairs, within the state provided that the period of employment for any seasonal employee at any or all agricul-

tural fairs does not exceed fourteen working days a year".

Laws 1977, Ex.Sess., ch. 74, § 1, in subsec. (1), added "nor to any individual employed as a motion picture projectionist if that employee is covered by a contract or collective bargaining agreement which regulates hours of work and overtime pay".

Laws 1989, ch. 104, § 1, in subsec. (1), at the end of the subsection, added the exclusion pertaining to individual drivers subject to the Federal Motor Carrier Act.

Laws 1992, ch. 94, § 1, rewrote the section.

Laws 1993, ch. 191, § 1, in the introductory paragraph of subsec. (3), inserted ", recreational vessels, recreational vessel trailers, recreational vehicle trailers, recreational campers, or manufactured housing".

Laws 1995, ch. 5, § 1, in subd. (2)(a), added the second sentence.

Laws 1997, ch. 203, § 2, inserted subsec. (3); and renumbered former subsecs. (3) and (4) as (4) and (5).

Laws 1997, ch. 311, § 1, in the introductory paragraph of subsec. (3) [now (4)], inserted a reference to farm implements.

Laws 1998, ch. 239, § 2, added subsec. (2)(i).

Cross References

Hours of labor, see § 49.28.010 et seq.

Law Review and Journal Commentaries

Straight-time overtime and salary basis: Reform of the Fair Labor Standards Act. 70 Wash.L.Rev. 1097 (1995).

Library References

Labor and Employment ⇐2210, 2252.
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Research References

ALR Library

162 ALR, Federal 575, Who is "Employee Employed in Agriculture" and Therefore Exempt from Overtime Provisions of Fair Labor Standards Act by § 13(B)(12) of Act (29 U.S.C.A. § 213(B)(12)).

123 ALR, Federal 485, When is Employee Paid on "Salaried Basis" in Order to Qualify as Bona Fide Executive, Administrative, or Professional Employee Under Labor Regulations (29 CFR §§ 541.1-541.3) Exempting Such Persons from Minimum Wage...

124 ALR, Federal 1, Who is Employed in "Administrative Capacity" Within Exemption, Under 29 U.S.C.A. § 213(A)(1), from Minimum Wage and Maximum Hours Provisions of Fair Labor Standards Act (29 U.S.C.A. §§ 201-219)...

26 ALR, Federal 941, Who is Employed in "Capacity of Outside Salesman" Within Meaning of § 13(A)(1) of Fair Labor Standards Act (29 U.S.C.A. § 213(A)(1)) as Amended, Exempting Such Employees from Minimum Wage and Overtime...

169 ALR 315, Comment Note.--Duty in Instructing Jury in Criminal Prosecution to Explain and Define Offense Charged.

169 ALR 1307, Provision of Fair Labor Standards Act for Increased Compensation for Overtime.

120 ALR 295, Constitutionality, Construction, and Application of Statutes Relating Specifically to Hours of Service or Other Conditions Affecting Drivers of Motor Trucks.

WAC 296-126-002

WAC 296-126-002
Definitions.

(1) "Employer" means any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees, unless exempted by chapter 49.12 RCW or these rules. For purposes of these rules, the state or its political subdivisions, municipal corporations, or quasi-municipal corporations (collectively called "public employers") are considered to be "employers" and subject to these rules in the following manner:

(a) Before May 20, 2003, public employers are not subject to these rules unless the rules address:

(i) Sick leave and care of family members under RCW 49.12.265 through 49.12.295.

(ii) Parental leave under RCW 49.12.350 through 49.12.370.

(iii) Compensation for required employee uniforms under RCW 49.12.450.

(iv) Employers' duties towards volunteer firefighters and reserve officers under RCW 49.12.460.

(b) On or after May 20, 2003, public employers are subject to these rules only if these rules do not conflict with the following:

(i) Any state statute or rule.

(ii) Any local resolution, ordinance, or rule adopted before April 1, 2003.

(2) "Employee" means an employee who is employed in the business of his employer whether by way of manual labor or otherwise. "Employee" does not include:

(a) Any individual registered as a volunteer with a state or federal volunteer program or any person who performs any assigned or authorized duties for an educational, religious, governmental or nonprofit charitable corporation by choice and receives no payment other than reimbursement for actual expenses necessarily incurred in order to perform such volunteer services;

(b) Any individual employed in a bona fide executive, administrative or professional capacity or in the capacity of outside salesperson;

(c) Independent contractors where said individuals control the manner of doing the work and the means by which the result is to be accomplished.

(3) "Employ" means to engage, suffer or permit to work.

(4) "Adult" means any person eighteen years of age or older.

(5) "Minor" means any person under eighteen years of age.

(6) "Student learner" means a person enrolled in a bona fide vocational training program accredited by a national or regional accrediting agency recognized by the United States Office of Education, or authorized and approved by the Washington state commission for vocational education, who may be employed part time in a definitely organized plan of instruction.

(7) "Learner" means a worker whose total experience in an authorized learner occupation is less than the period of time allowed as a learning period for that occupation in a learner certificate issued by the director pursuant to regulations of the department of labor and industries.

(8) "Hours worked" shall be considered to mean all hours during which the employee is authorized or required by the employer to be on duty on the employer's premises or at a prescribed work place.

(9) "Conditions of labor" shall mean and include the conditions of rest and meal periods for employees including provisions for personal privacy, practices, methods and means by or through which labor or services are performed by employees and includes bona fide physical qualifications in employment, but shall not include conditions of labor otherwise governed by statutes and rules and regulations relating to industrial safety and health administered by the department.

(10) "Department" means the department of labor and industries.

(11) "Director" means the director of the department of labor and industries or the director's designated representative.

[Statutory Authority: Chapter 49.12 RCW. 10-04-092, § 296-126-002, filed 2/2/10, effective 3/15/10; Order 76-15, § 296-126-002, filed 5/17/76; Order 74-9, § 296-126-002, filed 3/13/74, effective 4/15/74.]